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SPEECHES
OF
LORD ERSKINE,

WHILE AT THE BAR.

EDITED BY
JAMES L. HIGH,
COUNSELOR AT LAW.

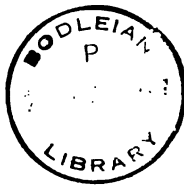


VOLUME IV.

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Speech for GEORGE STRATTON, HENRY BROOKE,
CHARLES FLOYER, *and* GEORGE METCALF,
Esquires, of the Council of Madras.

The following speech was one of the earliest of Mr. Erskine's efforts at the bar, having been delivered in the Court of King's Bench, on the 5th of February, 1780. It was omitted from the former volumes, because not falling within their general scope, and is, therefore, inserted among his miscellaneous speeches.

The case had its origin in the arrest and imprisonment of Lord Pigot, Governor of Madras, by a majority of the council of that settlement, in the year 1776. On the recall of the council to England by the directors of the East India Company, a motion was made in the House of Commons for their prosecution by the Attorney-General for a high misdemeanor.

Admiral Pigot, brother of Lord Pigot, being at that time a member of the house, and connected in politics with the opposition party in Parliament, an extraordinary degree of acrimony arose upon the subject, and the House of Commons came to a resolution to prosecute Messrs. Stratton and others in the Court of King's Bench; an information was accordingly filed against them by the Attorney-General. They were defended by Mr. Dunning and other prominent advocates of that time, but were found guilty; and, on their being brought up to receive judgment, Mr. Erskine, who was then only junior counsel, made the following speech in mitigation of their punishment.

SPEECH OF MR. ERSKINE FOR THE
COUNCIL OF MADRAS,

IN MITIGATION OF PUNISHMENT.

MY LORD,

I really do not know how to ask, or even to expect, the attention of the court ; I am sure it is no gratification to me to try your lordship's patience on a subject so completely exhausted. I feel, besides, that the array of counsel assembled on this occasion, gives an importance and solemnity to the conviction which it little deserves, and carries the air of a painful resistance of an unexpected punishment, which it would be a libel on the wisdom and justice of the court to expect.

But in causes that, from their public nature, have attracted the public notice, and in which public prejudices have been industriously propagated and inflamed, it is very natural for the objects of them to feel a pleasure in seeing their actions (if they will bear a naked inspection) repeatedly stripped of the disguise with which the arts of their enemies had covered them, and to expect their counsel to be, as it were, the heralds of their innocence, even after the minds of the judges are convinced. They are apt, likewise, and with some

reason, to think, that, in this stage of a prosecution, surplusage is less offensive, the degree of punishment not being reducible to a point like a legal justification, but subject to be softened and shaded away by the variety of views in which the same facts may be favorably and justly presented, both to the understanding and the heart. Such feelings, my lord, which I more than guess are the feelings of my injured clients, must be my apology for adding anything to what my learned leaders have already, I think, unanswerably urged in their favor. It will be, however, unnecessary for me to fatigue your lordship with a minute recapitulation of the facts; I shall confine myself to the prominent features of the cause.

The defendants are convicted of having assumed to themselves the power of the government of Madras, and with having assaulted and imprisoned Lord Pigot. I say they are convicted of that. because, although I am aware that the general verdict of guilty includes, likewise, the truth of the first count of the information, which charges the obstruction of Lord Pigot in carrying into execution the specific orders of the company, yet it is impossible that the general verdict can at all embarrass the court in pronouncing judgment, it being notorious, on the face of the evidence, first, that there were no direct or specific orders of the company touching the points which occasioned

either the original or final differences, the rajah of Tanjore being, before the disputes arose, even beyond the letter of the instructions, restored and secured; secondly, that the instructions, whatever they were, or however to be construed, were not given to the single construction of Lord Pigot, but to him and his council, like all the other general instructions of that government.

The company inclined that the rajah of Tanjore should be restored without infringing the rights of the nabob of the Carnatic; but how such restoration and security of the rajah could, or was to be effected without the infringement of those rights of the nabob, which were not to be violated, the company did not leave to the single discretion of Lord Pigot, but to the determination of the ordinary powers of the government of Fort Saint George, acting to the best of their understandings, responsible only, like all other magistrates and rulers, for the purity of their intentions.

It is not pretended that the company's instructions directed the rajah's security to be effected by the residence of a civil chief and council in Tanjore, or by any other civil establishment whatsoever; on the contrary, they disavow such appropriation of any part of the revenues of that country; yet the resisting a civil establishment in the person of Lord Pigot's son-in-law, Mr. Russell, destined too by the company for a different and

incompatible service, is the specific obstruction which is the burden of the first count of the information, and which is there attempted to be brought forward as an aggravation of the assumption of the general powers of the government; the obstruction of what was not only not ordered by the company, but of which their orders implied, and in public council were admitted by one of Lord Pigot's adherents to imply, a disapprobation and prohibition.

The claims of Mr. Benfield, the subject of so much slanderous declamation without proof, or attempt of proof, and what is more extraordinary, without even charge or accusation, are subject to the same observations. The orders to restore the rajah to the possession of his country certainly did not express, and, if my judgment does not mislead me, could not imply, a restitution of the crops sown with the Prince's money, advanced to the inhabitants on the credit of the harvest, without which universal famine would have ensued.

Had the nabob indeed seized upon Tanjore in defiance of the company, or even without its countenance and protection, he would, no doubt, have been a *mala fide* possessor *quoad* all transactions concerning it with the company's servants, whatever the justice of his title to it might in reality have been; and the company's governors, in restoring the rajah, paying no respect to such usurped

possession, would have been justifiable in telling any European who had lent his money on the security of Tanjore, "Sir, you have lent your money with your eyes open to a person whose title you knew not to be ratified by our approbation, and we can not, therefore, consider either his claim or yours derived from it." But when the nabob was put into possession by the company's troops; when that possession, so obtained, was ratified in Europe, at least by the silence of the company, no matter whether wisely or unwisely, justly or unjustly; and after the nabob had been publicly congratulated upon such possession by the King's plenipotentiary, in the presence of all the neighboring princes in India, I confess I am at a loss to discover the absurdity (as it has been called) of the nabob's pretensions. And it must be remembered, that Mr. Benfield's derivative title was not the subject of dispute, but the title of the nabob, his principal, from whence it was derived. I am, therefore, supported by the report of the evidence in saying, that it does not appear that the differences in council arose, were continued, or brought to a crisis, on points where Lord Pigot had the company's orders, either express or implied, to give any weight to his single opinion, beyond the ordinary weight allotted to it by the constitution of the settlement, so as to justify the court to consider the dissent of the majority from his measures

to be either a criminal resistance of the president, or a disobedience of the company's specific or general instructions.

Thus perishes the first count of the information, even if it had been matter of charge! But much remains behind. I know it is not enough that the company's orders were not specific touching any of the points on which the differences arose, or that they were silent touching the property of the crop of Tanjore, or that the nabob's claim to it had the semblance, or even the reality of justice. I admit that it is not sufficient that the defendants had the largest and most liberal discretion to exercise, if that discretion should appear to have been warped by bad, corrupt, or selfish motives. I am aware that it would be no argument to say, that the acts charged upon them were done in resistance of Lord Pigot's illegal subversion, if it could be replied upon me, and that reply be supported by evidence, that such subversive acts of Lord Pigot, though neither justifiable or legal, were in laudable opposition to their corrupt combinations. I freely admit that, if such a case were established against me, I should be obliged to abandon their defence, because I could apply none of the great principles of government to their protection; but, if they are clear of such imputations, then I can and will apply them all.

My lord, of this bad intention there is no proof

—no proof, did I say?—there is no charge! I can not reply to slander here. I will not debase the purity of the court by fighting with the phantoms of prejudice and party, that are invisible to the sedate and sober eye of justice! If it had been a private cause, I would not have suffered my clients, as far as my advice could have influenced, to have filed a single affidavit in support of that integrity which no complaint attached upon, and which no evidence had impeached; but, since they were bound like public victims, and cast into this furnace, we wished them to come forth pure and white. Their innocence is, therefore, witnessed before your lordships, and before the world, by their most solemn oaths; and it is surely no great boon to ask credit for facts averred under the most sacred obligations of religion, and subject to criminal retribution even here, which you are bound, in the absence of proof, not only in duty as judges, but in charity as men, to believe without any oaths at all.

They have denied every corrupt motive and purpose, and every interest, directly or indirectly, with Mr. Benfield, or his claims. But, says Mr. Rous, Benfield was a man of straw, set up by the nabob; be it so. They have positively sworn that they had no interest, directly or indirectly, in the claims of the nabob himself; no interest, directly or indirectly, in the property of the crop

of Tanjore; no interest, directly or indirectly, beyond their duty, in the preference of Colonel Stuart's appointment to Mr. Russell's; nor any interest, direct or indirect, in any one act which is the subject of the prosecution, or which can, by the most collateral direction, be brought to bear upon it. Such are the affidavits; and if they be defective, the defect is in us. They protested their innocence to us, their counsel, and, telling us that there was no form in which language could convey asseverations of the purity of their motives which they could not with a safe conscience subscribe to, they left it to us to frame them in terms to exclude all evasion.

But circumstances come in aid of their credit stronger than all oaths. Men may swear falsely; men may be perjured, though a court of justice can not presume it; but human nature can not be perjured. They did not do the very thing, when they got the government, for which they are supposed to have usurped it. The history of the world does not afford an instance of men wading through guilt for a purpose which, when within their grasp, they never seized, or looked that way it lay.

When Mr. Benfield first laid his claims before the board, Lord Pigot was absent in Tanjore, and Mr. Stratton was the legal governor during his absence, who might therefore have, in strict regu-

larity, proceeded to the discussion of them; but he referred them back to Lord Pigot, and postponed that discussion till his return. When, on that discussion, they were declared valid by a legal majority, they neither forced them, nor threatened to force them, on the rajah, but only recommended it to him to do justice, leaving the time and the manner to himself; and, when at last they assumed the government, they did not change their tone with their power; the rajah was left unrestrained as before; and at this hour the claims remain in the same situation in which they stood at the commencement of the disputes. Neither the nabob nor Mr. Benfield have derived the smallest advantage or support from the revolution in the government.

This puts an end to all discussion of Indian politics, which have been artfully introduced to puzzle and perplex the simple merits of this cause. I have no more to do with the first or second Tanjore war than with the first or second Carthaginian war. I am sorry, however, my absence yesterday in the House of Commons prevented me from hearing the history of them, because, I am told, Mr. Rous spoke with great ability, and, I am convinced from what I know of his upright temper, with a zeal that, for the moment, justified what he said to his own bosom; but, if I am not misinformed, his zeal was his only brief; his imagi-

nation and resentment spurned the fetters both of fact and accusation; and his acquaintance with Indian affairs enabled him to give a variety to the cause, by plausible circumstances beyond the reach of vulgar, ignorant malice to invent. It was calculated to do much mischief, for it was too long to be remembered, and too unintelligible to be refuted; yet I am contented to demand judgment on my clients on Mr. Rous' terms. He tells your lordship, that their intentions can not be known till that time when the secrets of all human hearts shall be revealed; and then, in the same breath, he calls for a punishment, as if they were revealed already. It is a new, ingenious, and summary mode of proceeding—*festinum remedium*, an assize of conscience. If it should become the practice, which, from the weight of my learned friend, I have no manner of doubt it will, we shall hear such addresses to juries in criminal courts as this: "Gentlemen, I am counsel for the prosecution, and I must be candid enough to admit that the charge is not proved against the defendants. There is certainly no legal evidence before you to entitle the Crown to your verdict; but as there is little reason to doubt that they are guilty, and as this deficiency in the evidence will probably be supplied at the day of judgment, you are well warranted in convicting them; and if, when the day of judgment comes, both you and I should turn

out to be mistaken, they may move for a new trial."

This was the general argument of guilt; and, in the particulars, the reasoning was equally close and logical. How, says Mr. Rous, can it be believed that the Tanjore crop was not the corrupt foundation of the defendants' conduct, when it appears from day to day, on the face of all the consultations, as the single object of dispute? That it was the object of dispute I shall, for argument's sake, admit; but does Mr. Rous' conclusion follow from the admission of his premises? I will tell him why it does not. It is so very plain a reason, that, when he hears it, he will be astonished he did not discover it himself. Let me remind him, then, that all the inferences which connections with the nabob so amply supplied on the one hand, connections with the rajah would as amply have supplied on the other. If the Tanjore crop was the bone of contention, the rajah, by keeping it, had surely the same opportunity of gratitude to his adherents that the nabob had to his by snatching it from him. The appointment of Mr. Russell to the residency of Tanjore—Mr. Russell, the friend, the confidant, the son-in-law of Lord Pigot—was surely as good a butt for insinuation as Colonel Stuart for the whole council. The ball might, therefore, have been thrown back with redoubled violence; and I need not remind the

court that the cause was conducted on our part by a gentleman whose powers of throwing it back it would be folly in me to speak of; but he nobly disdained. He said he would not hire out his talents to scatter insinuation and abuse, when the administration of right and justice did not require it; and his clients, while they received the full, faithful, and energetic exercise of his great abilities, admired and applauded the delicate, manly rectitude of his conduct; they felt that their cause derived a dignity and a security from the man, greater than the advocate, and even than such an advocate, could bestow.

I shall follow the example of Mr. Dunning. God forbid, my lord, that I should insult the ashes of a brave man, who, in other respects, deserved well of his country; but let me remind the gentlemen on the other side, that the honor of the living is as sacred a call on humanity and justice as the memory of the dead.

My lord, the case, thus stripped of the false colors thrown upon it by party defamation, stands upon plain and simple principles, and I shall, therefore, discuss it in the same arrangement which your lordships pursued in summing up the evidence to the jury at the trial, only substituting alleviation for justification.

First, In whom did the ordinary powers of the government of Madras reside?

Secondly, What acts were done by Lord Pigot, subversive of that government?

Thirdly, What degree of criminality belongs to the confessedly illegal act of the defendants, in assuming to themselves the whole powers of the government so subverted? I say so subverted; for I must keep it constantly in the eye of the court, that the government was subverted, and was admitted by your lordship at the trial, to have been subverted by Lord Pigot before it was assumed by the majority of the council.

First, then, in whom did the government of Fort Saint George reside? And, in deciding this question, it will not be necessary to go, as some have done, into the general principles of government, or to compare the deputation of a company of merchants with great political governments, either ancient or modern. The East India Company, being incorporated by act of Parliament, derived an authority from their charter of incorporation to constitute inferior governments, dependent on them for the purposes of managing their concerns in those distant parts. Had the company at the time the charter was granted, been such an immense and powerful body as it has since become from the trade and prosperity of the empire, it might have happened that the forms of these governments would have been accurately chalked out by Parliament, and been

made part of the charter; in which case, the charter itself would have been the only place to have resorted to for the solution of any question respecting the powers of such governments, because the company, by the general law of all corporations, could have made no by-laws, or standing orders repugnant to it; but, on the other hand, the charter having left them at liberty, in this instance, and not having prescribed constitutions for their territorial governments in India, there can be no possible place to resort to for the solution of such questions, but to the commissioners of government granted by the company; their standing orders, which may be considered as fundamental constitutions; and such explanatory instructions as they may, from time to time, have transmitted to their servants for the regulation of their conduct. By these, and these alone, must every dispute arising in the governments of India be determined, except such as fall within the cognizance of the act of the thirteenth of George the third, for the regulation of the company's affairs, as well in India as in Europe.

First, then, as to the commission of government, where the clause, on which they build the most, is made to run thus: "And to the end that he might be the better enabled to manage all the affairs of them, the said company, they appointed certain persons, therein named, to be of their

council at Fort Saint George." These words would certainly imply the president to be an integral and substantive part distinct from the council ; but, unfortunately, no such words are contained in the commission for government, which speaks a very different language, almost in itself conclusive against the propositions they wish to establish. The words are, " And to the end that the said George Lord Pigot might be the better enabled to manage all the affairs of us, the said company, we do constitute and ordain George Stratton, Esq., to be second in our council of Fort Saint George, to wit, to be next in council after our said President George Lord Pigot." It is impossible for the English language more plainly to mark out the president to be merely the first in council, and not an integral substantive part, assisted by a council ; for, in such case, Mr. Stratton, the senior councillor, would, it is apprehended, be called the first in council, instead of the second in council, to wit, next after the president ; and this clause in the commission, so explained, not only goes far by itself to resist the claim of independence in the president, but takes off from the ambiguity and uncertainty which would otherwise cloud the construction of the clause that follows, viz. : " And we do hereby give and grant unto our said president and governor, George Lord Pigot, and to our council afore-named, or the

major part of them, full power and authority," etc. The president and council being here named distinctly, the word them, without the foregoing clause, might seem to constitute the president an integral part, and separate from the council; but the president, having been before constructively named as the first in council, Mr. Stratton, though the senior councillor, being expressly named the second, it is plain the word them signifies the majority of such council, of which the president is the first, and who is named distinctly, not only by way of pre-eminence, but because all public bodies are called and described by their corporate names, and all their acts witnessed by their common seals, whatever their internal constitutions may be. No heads of corporations have, by the common law of England, any negative on the proceedings of the other constituent parts, unless by express provision in their charters; yet all their powers are given to them, and exercised by them, in their corporate names, which ever makes the head of a party, although he may be dissentient from the act that receives authority from his name.

The standing orders of the company, published in 1687 and 1702, which may be considered as fundamental constitutions, are plain and unequivocal; they enjoin, "That all their affairs shall be transacted in council, and ordered and managed as the majority of the council shall determine, and

not otherwise on any pretence whatsoever." And again, "That whatever is agreed on by the majority shall be the order by which each one is to act ; and every individual person, even the dissenters themselves, are to perform their parts in the prosecution thereof."

The agreement of the majority being denominated an order, shows as clearly as language can do, that obedience is expected to their determination ; and it is equally plain, that no constituent member of that government can frustrate or counteract such order, since each individual, even the dissenters themselves, are commanded to act in conformity to it, and to perform their parts in the prosecution thereof. In speaking to dispassionate men, it is almost needless to add any arguments to show that the president's claim to refuse to put a question, adopted by a majority of council, stands upon the very same grounds as his claim to a negative on their proceedings, and that, if the first be overturned, the second must fall along with it ; for if he be not an integral part of the government, and his concurrence be consequently not necessary to constitute an act of it, then his office as president, with respect to putting questions, must necessarily be only ministerial, and he can not obstruct the proceedings by refusing to put them ; for, if he could, his power would be equal in effect to that of an integral part ; and it would be a

strange solecism indeed, if, at the same time that all the affairs of the government were to be managed and ordered by the opinions of a majority, the president could prevent such opinions from ever being collected; and at the same time that their acts would bind him, could prevent such acts from ever taking place. But it is altogether unnecessary to explain, by argument and inference, that which the company, who are certainly the best judges of their own meaning, have explained in absolute and unequivocal terms by their instructions sent by Mr. Whitehill to Madras, explanatory of the new commission, by which they expressly declare the government to be in the major part of the council, giving the president, or the senior councillor in his absence, a casting vote, and directing that every question proposed in writing by any member of council shall be put by the governor, or, in his absence, by the senior member acting as president for the time being; and that every question carried by a majority shall be deemed the act of the president and council. Indeed, the uniform determinations of the directors on every occasion where this question has been referred to them, have been in favor of the majority of council. Even so late as the 21st of April, 1777, subsequent to the disturbances at Madras, it will be found upon their records to have been resolved by ballot, "That the powers

contended for and assumed by Lord Pigot, are neither known in the constitution of the company, nor authorized by charter, nor warranted by any orders or instructions of the court of directors." It is clear, therefore, beyond all controversy, that the president and council were, at all times, bound and concluded by the decision of the majority, and that it was his duty to put every question proposed by any member of the board.

Had these regulations been made part of the new commission, they might have been considered as a new establishment, and not as a recognition of the former government; and, consequently, such regulations, subsequent to the disturbances, could be no protection for the majority acting under the former commission; but the caution of the East India Company, to exclude the possibility of such a construction, is most striking and remarkable. Sitting down to frame a new commission, under the immediate pressure of the difficulties that had arisen from the equivocal expressions of the former, they, nevertheless, adopt and preserve the very same words in all the parts on which the dispute arose, the two commissions differing in nothing except in the special preamble restoring Lord Pigot; and the object of this caution is self-evident, because, if, instead of thus preserving the same form, and sending out collateral instructions to explain it, they had rendered the new commis-

sion more precise and unequivocal by new modes of expression, it would have carried the appearance of a new establishment of what the government should in future be, and not as a recognition and definition of what it always had been ; but by thus using the same form of commission, and accompanying it with explanatory regulations, they, beyond all dispute, pronounced the former commission always to have implied what they expressly declare the latter to be, as it is impossible to suppose that the company would make use of the same form of words to express delegations of authority diametrically opposite to each other. But taking it, for argument's sake, to be a new establishment rather than a recognition, still it is a strong protection to the defendants. If the question, indeed, was concerning the regularity of an act done by the majority, without the president, coming before the court by a person claiming a franchise under it, or in any other civil shape where the constitution of the government was in issue, my argument, I admit, would not hold ; the court would certainly in such case be obliged to confine itself strictly to the commission of government, and such explanatory constitutions as were precedent to the act, the regularity of which was the subject of discussion ; but it is very different when men are prosecuted criminally for subverting a constitution, and abusing delegated authority :

they are not to be punished, I trust, for the obscurity of their employer's commissions, if they have been fortunate enough, notwithstanding such obscurity, to construe them as they were intended by their authors. If their employers declare, even after an act done, "This is what we meant should be our government," that ought to be sufficient to sanction previous acts that correspond with such declarations, more especially declarations made on the spur of the occasion which such previous acts had produced; for otherwise this monstrous supposition must be admitted, viz: That the company had enlarged the power of their servants, because they had, in defiance of their orders, assumed them when they had them not; whereas the reasonable construction of the company's subsequent proceeding is this: It is necessary that our council, on the president's refusing to perform his duty, should have such powers of acting without him as they have assumed in the late emergency; the obscurity of our commissions and instructions has afforded a pretence of resistance, which has obliged our servants either to surrender the spirit of their trusts, or to violate the form. To prevent such disputes in future, we do that hitherto unknown; we make a regular form of government, and, at the same time, prescribe a rule of action in case it should not act up to the end of its present institution, to prevent an exercise of discretion always, if

possible, to be avoided in every government, but more especially in such as are subordinate. Therefore, my lord, whether the late instructions be considered as explanatory, or enacting, they ought to be a protection to the defendants in a criminal court, unless when their employers are the prosecutors. Neither parliament, nor the Crown, ought to interfere; but, as they have done it, no evidence ought to have convicted them of assuming the powers of government, and obstructing the company's service, but the evidence of the directors of that company under whom they acted. They ought not to be judged by blind records and parchments, whilst the authors of them are at hand to explain them. It is a shocking absurdity to see men convicted of abusing trusts, when the persons who gave them are neither prosecutors nor witnesses against them.

The ordinary powers of the government of Madras being thus proved to have resided in the majority of the council, it now only remains to show, by a short statement of the evidence, the necessity which impelled the extraordinary, and otherwise unwarrantable, exercise of such powers in suspending and imprisoning Lord Pigot; for they once more enter a protest against being thought to have assumed and exercised such power as incident to their commission, while the government subsisted. It is their business to show, that, as

long as the government continued to subsist, they faithfully acted their parts in it; and that it was not till after a total subversion of it, by an arbitrary suspension of the governing powers, that they asserted their own rights, and restored the government by resuming them.

On the 8th of July, Lord Pigot refused, as president, to put a question to the board (upon the regular motion of a member), for rescinding a resolution before entered into. This refusal left the majority no choice between an absolute surrender of their trusts, and an exercise of them without his ministerial assistance; there was no other alternative, in the absence of a superior coercive authority, to compel him to a specific performance of his duty; but they proceeded no farther than the necessity justified; they did not extend the irregularity (if any there was) beyond the political urgency of the occasion. Although their constitutional rights were infringed by the president's claim, they formed no plan for their general vindication, but contented themselves with declaring, on that particular occasion, that, as the government resided in them, the president ought not to refuse putting the question, and that the resolution ought to be rescinded.

When the president again refused to put the question, in the month following, for taking into consideration the draughts of instruction to Colo-

nel Stuart (which was the immediate cause of all the disturbances that followed), they again preserved the same moderation, and never dreamt of any farther vindication of their authority, thus usurped, than should become absolutely necessary for the performance of the trusts delegated to them by the company, which they considered it to be treachery to desert. They lamented the necessity of departing even from form; and, therefore, although the president's resolution to emancipate himself from their constitutional control was avowed upon the public minutes of the consultations, they first adjourned without coming to any resolution at all, in hopes of obtaining formality and regularity to their proceedings, by the president's concurrence. Disappointed in that hope, by his persevering to refuse, and driven to the necessity of either surrendering their legal authority, or of devising some other means of exercising it without his personal concurrence, having (as before observed) no process to compel him to give it, they passed a vote approving of the instructions, and wrote a letter to Colonel Harper, containing orders to deliver the command to Colonel Stuart; but they did not proceed to sign it at that consultation, still hoping, by an adjournment, to gain Lord Pigot's sanction to acts legal in all points by the constitution of the government, ex-

cept, perhaps, in wanting that form which it was his duty to give them.

The use which Lord Pigot made of this slowness of the majority to vindicate the divided rights and spirit of the government, by a departure from even its undecided forms, notwithstanding the political necessity which arose singly from his own illegal refusal, is very luckily recorded by one of his lordship's particular friends in council, and a party to the transaction, as it would have been, otherwise, too much to have expected full credit to it from the most impartial mind.

"It had been discussed," says Mr. Dalrymple, "before the council met, what measures could be taken to support the government established by the company, in case the majority should still persist in their resolution to come to no compromise, or reference of the matter in question to the decision of the court of directors, but to carry things to extremity. One mode occurred to Lord Pigot, viz., by putting Colonel Stuart in arrest if he obeyed an order without the governor's concurrence. To this many objections arose. Colonel Stuart might contrive to receive the orders without the garrison, and, consequently, by the new military regulations, not be liable to the governor's arrest. If he was arrested, the majority would, of course, refuse to issue a warrant for a court-

martial, and confusion and disgrace must be the consequence.

“The only expedient that occurred to any of us was, to ground a charge, in case of making their declaration in the name of the council, instead of the president and council; but here an apprehension arose, that they would see this impropriety, and express their order, not in the name of the council, as they had hinted, but in the name of the president and council, maintaining that the majority constituted the efficient board of president and council. In this case we could devise no measure to be pursued consistent with the rules of the service; but Lord Pigot said there was no fear of this, as he insisted the secretary would not dare to issue any order in his name when he forbade it. It was impossible to know whether Sir Robert Fletcher would attend or not. It was necessary to have every thing prepared, that nothing might be left to be done in council. The company’s orders required the charge to be writing; the governor, therefore, had in his pocket charges prepared for every probable contingency, whether they began at the eldest or the youngest, and whether the form was an order from themselves, or an order to the secretary, and whether Sir Robert Fletcher was present or not. It was agreed that the first of us to whom the paper was presented for signing should immediately hand it

to the president, who was then to produce the charge. The standing orders directing that members against whom a charge is made should have no seat, the members charged were, of course, deprived of their votes. As our ideas went no farther than relieving the governor from the compulsion the majority wanted to lay him under, it was determined to suspend no more than the necessity of the circumstance required."

With this snare laid for them during the interval of that adjournment, which their moderation had led them to, the council met on the 22d of August, and after having recorded their dissent from the president's illegal claim to a negative on their proceedings, by refusing to perform his part in the prosecution of them (though strictly enjoined thereto by the standing orders of the company), and in which refusal he still obstinately persisted, they entered a minute, declaring it as their opinion that the resolution of the council should be carried into execution without further delay, and that the instructions to Colonel Stuart, and the letter to Colonel Harper, should be signed by the secretary, by order of council.

This minute was regularly signed by a majority ; and the president having again positively refused his concurrence, they prepared a letter to Mr. Secretary Sullivan, approving of the instructions

to Colonel Stuart, and the letter to Lieutenant-Colonel Harper.

The letter thus written, in the name of the majority, and under their most public and avowed auspices, it was the immediate purpose of all of them to have signed in pursuance of the minute they had just before delivered in, expressive of their authority to that purpose; but the president, according to the ingenious plan preconceived during the adjournment, snatched the paper from Mr. Brooke, after he and Mr. Stratton had signed it, before the rest of the majority could put their names to it, and pulling a written accusation out of his pocket, charged them as being guilty of an act subversive of the government, put the question of suspension on both at once, and ordered the secretary to take neither of their votes, which, according to Mr. Dalrymple's economical scheme of illegality, exactly got rid of the majority, by his own (the accuser's) casting vote.

The weakness and absurdity of the principle (if it deserves the name) on which this suspension was founded, creates a difficulty in seriously exposing it by argument; yet, as it produced all the consequences that followed, I can not dismiss it without the following remarks:

First, It was a gross violation of the constitution of the government, even admitting Lord Pigot to have been that integral part of it which

he assumed to be, as the establishment of that claim could only have given him a negative on the proceedings of a majority, but never could have enabled him to fabricate one so as to do positive acts without one. The sudden charge and suspension of Messrs. Stratton and Brooke, and breaking the majority by putting the question on both at once, would, therefore, have been irregular, even supposing the concurrence of the majority to the act which constituted the charge against them to have been unknown to Lord Pigot, and the minority who voted with him; but when their concurrence was perfectly known—when the majority of the board had just before publicly delivered in a minute expressive of their right to authorize the secretary to sign the order, if the president refused to do it—when the order was avowedly drawn out in pursuance of that minute, which made the whole one act, and was in the regular course of signing by the majority, who had just before declared their authority to sign it—the snatching the paper under such circumstances, while unfinished, and arraigning those who had already signed it under the auspices of the majority, as being guilty of an act subversive of the government, lodged in that majority, and turning it into a minority by excluding the votes of the parties charged was a trick upon the governing powers which they could neither have submitted

to with honor to themselves, or duty to their employers

Such a power, however, Lord Pigot assumed over the government of Fort St. George, by converting an act of the majority, rendered necessary by his refusal to do his duty, into a criminal charge against two members acting under their authority; and by a device too shallow to impose on the meanest understanding, cut them off from acting as part of that majority, by which the powers of the government were subverted, and passed away from them while they were in the very act of saving them from subversion.

It is unnecessary to say that they were neither called upon in duty, nor even authorized, had they been willing to attend the summons of a board so constituted by the foulest usurpation—a board at which they must either have sacrificed their consciences and judgments, or become the vain opposers of measures destructive to the interests of their employers; they therefore assembled, and answered the illegal summons by a public protest against the usurped authority by which it issued. To this council, assembled for the single purpose of sending such protest, they did not, indeed, summon the subverters of the government against whom it was leveled. Affairs had arrived at too dangerous a crisis to sacrifice substance to forms, which it was impossible should have been regarded.

Lord Pigot and his associates, on receiving the protest against the proceedings of the 22nd of August, completed the subversion of the constitution, by the suspension of the rest of the majority of the counsel, and ordered Sir Robert Fletcher, the commander-in-chief, to be put under arrest, to be tried by a court-martial for asserting the rights of the civil government as a member of the council. This is positively sworn to have been done by Lord Pigot before their assumption of the government. Here then was a crisis in which it was necessary to act with decision, and, in asserting their rights by civil authority, to save the impending consequences of tumult and blood. The period of temporizing was past, and there was no doubt of what it was their duty to do. Charged with the powers of the government, they could not surrender them with honor; and it was impossible to maintain them with safety or effect, while their legal authority was treated as usurpation and rebellion. They therefore held a council, and agreed that the fortress and garrison should be in their hands, and under their command, as the legal representatives of the company, and, as there was every thing to dread from the intemperance of Lord Pigot's disposition, they, at the same time, authorized Colonel Stuart to arrest his person if he thought it necessary, to preserve the peace of the settlement. Colonel Stuart did think

it necessary, and his person was accordingly arrested; but during his necessary confinement he was treated with every mark of tenderness and respect.

Such, my lord, is the case; and it is much to the honor of the defendants, that not a single fact appeared, or was attempted to be made appear, at the trial, that did not stand avowed upon the face of their public proceedings. I say, literally none; for I will not wheel into court that miserable post-chaise, nor its flogged postilion, the only living birth of this mountain which has been two years in its labor—every thing, and the reason and motive of everything, appeared, and still appear, to speak and plead for themselves. No cabals—no private meetings—no coming prepared for all possible events—no secret manufacture of charges—no tricks to overcome majorities; —but every thing fair, open, and manly, to be judged of by the justice of their employers, the equity of their country, and the candor and humanity of the civilized world. As long as the government subsisted, their parts appear to have been acted in it with regularity and fidelity, nor was it till after a total subversion of it, by the arbitrary suspension of the governing powers (and in the absence of all superior visitation), that they asserted their own rights, and restored the government by re-assuming them. The powers so assumed, appear to have

been exercised with dignity and moderation. The necessary restraint of Lord Pigot's person was not tainted with any unnecessary rigor, but alleviated (notwithstanding the dangerous folly of his friends) with every enlargement of intercourse, and every token of respect. The most jealous disinterestedness was observed by Mr. Stratton in not receiving even the lawful profits of magistracy; and the temporary authority, thus exerted for the benefit of their employers, was resigned back into their hands with cheerfulness and submission; resigned, not like rapacious usurpers with exhausted revenues, disordered dependencies, and distracted councils, but with such large investments, and such harmonious dispositions, as have been hitherto unknown in the company's affairs in any settlement in the East.

Your lordships are, therefore, to decide this day on a question never before decided, or even agitated in any English court of justice; you are to decide upon the merits of a revolution—which, as all revolutions must be, was contrary to established law, and not legally to be justified. The only revolutions which have happened in this land have been when Heaven was the only court of appeal, because their authors had no human superiors; and so rapidly has this little island branched itself out into a great empire, that I believe it has never occurred that any disorder in

any of its foreign civil dependencies has been the subject of judicial inquiry ; but, I apprehend that, since the empire has thus expanded itself, and established governments at distances inaccessible to its own ordinary visitation and superintendence, all such subordinate governments, all political emanations from them, must be regulated by the same spirit and principles which animate and direct the parent state. Human laws neither do nor can make provision for cases which suppose the governments they establish to fall off from the ends of their institutions ; and, therefore, in such extraordinary emergencies, when forms can no longer operate, from the absence of a superior power to compel their operations, it strikes me to be the duty of the component parts of such governments to take such steps as will best enable them to preserve the spirit of their trusts ; in no event whatsoever to surrender them, or submit them to their subversion ; and, by considering themselves as an epitome of the constitution of their country, to keep in mind the principles by which that constitution has been preserved, and on which it is established.

These are surely fair premises to argue from, when the question is not technical justification, but palliation and excuse. The members of the council, in the majority of which the efficient government of Madras resided, were certainly as

deeply responsible to the India company in conscience, and on every principle of society, for the preservation of its constitution from an undue extension of Lord Pigot's power, as the other component parts of this government are answerable to the people of this country for keeping the King's prerogative within its legal limits; there can be no difference but that which I have stated, namely, that the one is subordinate, and the other supreme. But as, in the total absence of the superior power, subordination to it can only operate by an appeal to it for the ratification or annulment of acts already done, and not for directions what to do (otherwise, on every emergency, government must entirely cease), I trust it is not a strained proposition to assert, that there can be no better rule of action, when subordinate rulers must act somehow, owing to their distance from the fountain of authority, than the history of similar emergencies in the government of their country, of which they are a type and emanation.

Now, my lord, I believe there is no doctrine more exploded, or more repugnant to the spirit of the British government, because the revolution is built upon its ruin, than that there must be an imminent political necessity, analogous to natural necessity, to justify the resistance of the other component parts of the government, if one steps out of its delegation, and subverts the constitution.

I am not speaking of technical justification. It would be nonsense to speak of law and a revolution in the same sentence. But, I say, the British constitution, which is a government of law, knows no greater state necessity than the inviolate preservation of the spirit of a public trust from subversion or encroachment, no matter whether the country would fall into anarchy or blood, if such subversion or encroachment were suffered to pass unresisted. A good whig would swoon to hear such a qualification of resistance, even of the resistance of an integral part of legislation, much less of a part merely ministerial, which, in all governments, must be subordinate to the legislature, wherever it resides. Such a state necessity, analogous to natural necessity, may be necessary to call out a private man, but is not at all applicable to the powers of a government. The defendants did not act as private men, but as governing powers; for, although they were not, technically speaking, the government, when not assembled by the president; yet they were in the spirit of law, and on every principle of human society, the rulers of the settlement. The information charges the act as done by them in the public capacity of members of the council, in the majority of which the government did reside; and their act must, therefore, be taken to be a public act, for the preservation of their delegated trusts from sub-

version by Lord Pigot, which, on the true principle of British government, is sufficient to render resistance meritorious, though not legal.

Where was the imminent state necessity at the revolution in this country? King James suspended and dispensed with the laws. What laws? Penal laws against both Papists and Protestant dissenters. Would England have fallen into confusion and blood if the persecuted Papist had been suffered publicly to humbug himself with the mystery of transubstantiation, and the Independent to say his prayers without the mediation of a visible church? Parliament, on the contrary, immediately after the revolution, repealed many of those intolerant laws, with a preamble to the act that abolished them almost copied verbatim from the preamble of the proclamation by which the King suspended them; yet, that suspension (although King James was, I trust, something more of an integral part of this government than Lord Pigot was of that of Madras) most justly cost him the crown of these kingdoms. What was the principle of the revolution? I hope it is well known, understood, and revered by all good men. The principle was, that the trustees of the people were not to suffer an infringement of the constitution, whether for good or for evil. All tyrants are plausible and cunning enough to give their encroachments the show of public good. Our

ancestors were not to surrender the spirit of their trusts, though at the expense of the form, and though urged by no imminent state necessity to defend them; no other, at least, than that which I call, and which the constitution has ever since called, the first and most imminent of all state necessities, the inviolate preservation of delegated trusts from usurpation and subversion. This is the soul of the British government; it is the very being of every human institution which deserves the name of government; without it, the most perfect model of society is a painful and laborious work, which a madman or a fool may, in a moment, kick down and destroy.

Now, why does not the principle apply here? Why may not inferiors, in the absence of the superior, justly, though not legally, at all events without sanguinary punishment, do, by a temporary act, to be annulled or ratified by such superior, that which the superior would do finally, where there is no appeal at all? Will you punish men who were obliged from their distance from the fountain of authority to act for themselves, only for having, at all events, refused to surrender their trusts?—only for having saved the government committed to their charge from subversion?—only for having acted as it was the chief glory of our ancestors to have acted? The similitude does not, to be sure, hold throughout, but all the

difference is in our favor. Our act was not peremptory and final, but temporary, and submissive to annulment. Nor is the president of a council equal only to each other individual in it, with an office, merely ministerial, to be compared with the condensed executive majesty of this great, kingly government, with a negative in legislation.

The majority of the council was the efficient government of Madras, or, in other words, the legislature of the settlement, whose decisions the company directed should be the order by which each one was to act, without giving any negative in legislation to the president, whose office was consequently (as I have before said) ministerial. This ministerial office he not only refused to perform, but assumed to himself, in effect, the whole government, by dissolving a majority against him. Let me put this plain question to the court: Ought such arbitrary, illegal dissolution to have been submitted to? Ought the majority, which was, in fact, the whole government in substance, spirit, and effect, though not in regular form, to have suffered itself to be thus crumbled to pieces and destroyed? Was there, in such a case, any safe medium between suffering both spirit and form to go out together, and thus sacrificing the form to preserve the spirit? and could the powers of the government have been assumed or exercised without bloodshed, if Lord Pigot had been

left at large? I appeal to your lordships, whether human ingenuity could have devised a middle road in the absence of all superior control. Ought they to have acquiesced, and waited for the sentence of the directors, and, on his motion, played at shuttlecock with their trusts across the globe, by referring back questions to Europe which they were sent out to Asia to decide? . Where representatives doubt what are the wishes of their constituents, it may be proper to make such appeals; but if they were subject to punishment for not consenting to them, whenever one of their body proposed them, government would be a mere mockery. It would be in the power of the president, whenever he pleased, to cripple all the proceedings of the council. It puts me in mind of the embargo once laid upon corn by the Crown, during the recess of Parliament, which was said, in a great assembly, to be but forty days' tyranny at the outside; and it equally reminds me of the celebrated constitutional reply which was made on that occasion, which it would be indelicate for me to cite here, but which, I trust, your lordship has not forgotten.*

This would have been not only forty days' tyranny at the outside, but four hundred days' tyranny at the inside. It would have been a base

* Lord Mansfield's speech in the house of Lords against the dispensing power.

surrender of their trusts, and a cowardly, compromising conduct, unworthy of magistracy.

But the defendants are, notwithstanding all this, convicted; surely, then, either the jury or I mistake. If what I have advanced be sound or reasonable in principle, the verdict must be unjust. By no means. All I have said is compatible with the verdict. Had I been on the jury, I should have found them guilty; but had I been in the House of Commons, I would have given my voice against the prosecution. Conviction! Good God! how could I doubt of conviction, when I know that our patriot ancestors, who assisted in bringing about the glorious revolution, could not have stood justified in this court, though King William sat on the throne, but must have stood self-convicted criminals without a plea to offer in their defence, had not Parliament protected them by acts of indemnity!

Nothing that I have said could have been uttered without folly to a jury. It could not have been uttered with less folly to your lordship, sitting in judgment on this case, on a special verdict. They are not arguments of law; they are arguments of state, and the state ought to have heard them before it awarded the prosecution; but, having awarded it, your lordships now sit in their place to do justice. If the law, indeed, had prescribed a specific punishment to the fact charged, the

judgment of the law must have followed the conviction of the fact, and your lordships could not have mitigated the sentence, they could only have sued to the state for indemnity. It would in that case have been the sentence of the law, not of the judge. But it is not so here. A judge, deciding on a misdemeanor, is bound in conscience, in the silence of law, not to allot a punishment beyond his opinion of what the law, in its distributive justice, would have specifically allotted.

My lords, if these arguments, drawn from a reflection on the principles of society in general, and of our own government in particular, should, from their uncommonness in a court of justice, fail to make that immediate and decided impression which their justice would otherwise insure to them, I beseech your lordships to call to mind, that the defendants who stand here for judgment, stand before you for acts done as the rulers of a valuable, immensely-extended, and important country, so placed at the very extremity of the world, that the earth itself travels round her orbit in a shorter time than the eastern deputy can hear the voice of the European superior; a country surrounded, not only with nations which policy, but which nature—violated nature!—has made our enemies, and where government must, therefore, be always on the watch, and in full vigor, to maintain dominion over superior numbers by superior policy.

The conduct of men in such situations ought not surely to be measured on the narrow scale of municipal law. Their acts must not be judged of like the acts of a little corporation within the reach of a mandamus, or of the executive strength of the state. I can not, indeed, help borrowing an expression from a most excellent and eloquent person, when the conduct of one of our colony governments was, like this, rather hastily arraigned in Parliament. "I am not ripe," said a member of the House of Commons, "to pass sentence on the gravest public bodies, intrusted with magistracies of great weight and authority, and charged with the safety of their fellow-citizens on the very same title that I am ; I really think that, for wise minds, this is not judicious ; for sober minds, not decent ; for minds tinctured with humanity, not mild and merciful." Who can refuse his assent to such admirable, manly sentiments ? What, indeed, can be so repugnant to humanity, sound policy, decency, or justice, as to punish public men, acting in extremities not provided for by positive institution, without a corrupt motive proved, or even charged upon them ? I repeat the words again, that every man's conscience may force him to follow me, without a corrupt motive proved, or even charged upon them.

Yet it has been said, that public example ought to weigh heavily with the court in pronouncing

judgment. I think so too. It ought to weigh heavily indeed; but all its weight ought to be placed in the saving, not in the vindictive scale. Public example requires that men should be secure in the exercise of the great public duties they owe to magistracy, which are paramount to the obligations of obedience they owe to the laws as private men. Public example requires that no magistrate should be punished for an error in judgment, even in the common course of his duty, which he ought to know, and for which there is a certain rule; much less for an act like this, in which he must either do wrong by seizing the trust of another, or do wrong by surrendering his own. Public example requires that a magistrate should stand or fall by his heart; that is the only part of a magistrate vulnerable in law in every civilized country in the world. Who has wounded the defendants there? Even in this fertile age of perjury, where oaths may be had cheap, and where false oaths might be safe from the distance of refutation, no one champion of falsehood has stood forth, but the whole evidence was read out of a book printed by the defendants themselves, for the inspection of all mankind.

What, then, has produced this virulence of prosecution in a country so famed for the humanity of its inhabitants, and the mildness of its laws?—The death of Lord Pigot during the revolution in

the government? Strange, that malice should conjure up so improbable an insinuation as that the defendants were interested in that unfortunate event; no event, indeed, could be to them more truly unfortunate. If Lord Pigot had lived to return to England, this prosecution had never been. His guilt and his popularity, gained by other acts than these, would have been the best protection for their friendless innocence. Lord Pigot, besides many connections in this country, had a brother, who has, and who deserves to have, many friends in it. I can judge of the zeal of his friends, from the respect and friendship I feel for him myself; a zeal which might have misled me, as it has many better and wiser than me, if my professional duty had not led me to an early opportunity of correcting prejudice by truth. Indeed, some of the darkest and most dangerous prejudices of men, arise from the most honorable principles of the mind. When prejudices are caught up from bad passions, the worst of men feel intervals of remorse to soften and disperse them; but when they arise from a generous, though mistaken source, they are hugged closer to the bosom, and the kindest and most compassionate natures feel a pleasure in fostering a blind and unjust resentment. This is the reason that the defendants have not met with that protection from many which their meritorious public conduct

entitled them to, and which has given rise to a cabal against them so unworthy the legislature of an enlightened people—a cabal which would stand forth as a striking blot upon its justice, if it were not kept in countenance by a happy uniformity of proceeding, as this falling country can well witness. I believe, indeed, this is the first instance of a criminal trial in England, canvassed for like an election, supported by defamation, and publicly persisted in, in the face of a court of justice, without the smallest shadow of evidence. This deficiency has compelled the council for the Crown to supply the baldness of the cause with the most foreign invective ; foreign, not only in proof, but in accusation. In justice to them, I use the word compelled, as, I believe none of them would have been inclined, from what I know of their own manners and dispositions, to adopt such a conduct without a most imminent Westminster Hall necessity, viz., that of saying something in support of a cause which nothing but slander and falsehood could support. Their duty as public and private men, was, perhaps, as incompatible as the duty of my clients ; and they have chosen, like them, to fulfill the public one ; and, indeed, nothing less than the great ability and eloquence (I will not say the propriety), with which that public duty was fulfilled at the trial, could have saved the prosecution from ridicule and contempt. As for us, I am sure we

have lost nothing with the world, or with the court, by our moderation ; nor could the prejudices against us, even if the trial had not dispelled them, reach us within these venerable walls. Nothing, unsupported by evidence, that has been said here or anywhere, will have any other effect upon the court than to inspire it with more abundant caution in pronouncing judgment. Judges in this country are not expected to shut themselves up from society ; and, therefore, when a subject that is to pass in judgment before them, is of a public and popular nature, and base arts have been used to excite prejudices, it will only make wise and just magistrates (such as I know, and rejoice that I am addressing myself to) the more upon their guard, rigidly to confine all their views to the record of the charge which lies before them, and to the evidence by which it has been proved, and to be doubly jealous of every avenue by which human prejudices can force their way to mislead the soundest understandings, and to harden the most upright hearts.

The court, by its judgment, imposed a fine of a thousand pounds on each of the defendants.

THE

CASE OF THE BISHOP OF BANGOR

AND OTHERS ;

INDICTED FOR A RIOT AND AN ASSAULT.

Tried at Shrewsbury Assizes, on the 26th of July, 1796.

The indictment in this case was preferred against the Lord Bishop of Bangor, the Rev. Dr. Owens, the Rev. John Roberts, the Rev. John Williams, and Thomas Jones ; and was prosecuted by Samuel Grindley, the deputy-registrar of the bishop's consistorial court.

The charges were, that Samuel Grindley, the prosecutor, was deputy-registrar of the consistorial court of the bishopric of Bangor, and that being such, he had of right the occupation of the registrar's office adjoining to the cathedral ; that the bishop and the other defendants, intending to disturb the prosecutor in the execution of his office, and to trouble the peace of the King, unlawfully entered into the office, and stayed there for an hour, against the will of the prosecutor ; and it further charged, that they made a disturbance there against the King's peace, and assaulted Grindley, so being registrar, with intent to expel him from the office.

The indictment was originally preferred in the Court of Great Sessions, in Wales, where the offence was charged to have been committed, but for a more impartial hearing it was removed into the Court of King's Bench, and sent down for trial into the next adjoining county, before a special jury, at Shrewsbury, where Mr. Adam and Mr. Erskine attended on special retainers ; the former as counsel for the prosecution, and the latter for the bishop and the other defendants.

MR. ADAM FOR THE PROSECUTION.

MAY IT PLEASE YOUR LORDSHIP—GENTLEMEN OF THE JURY: You have heard from my learned friend, who has opened the pleadings to you, that Samuel Grindley is the prosecutor, and that he is deputy-registrar of the diocese of Bangor. You have heard, likewise, that the defendants are the bishop of Bangor, three clergymen, and a gentleman who is agent for the bishop.

In the outset of this cause, I have already learned enough, from the manner in which my learned friends have received the opening of the pleadings, to show me that they seem to have an inclination, as it were, to make that a jest, which, I can assure you, is a matter of extreme seriousness. Gentlemen, I introduce it to you with all the anxiety which belongs to a person who is unaccustomed to address you—I introduce it with the anxiety which belongs to a person who is to maintain a conflict with abilities that are seldom unsuccessful; but I open it to you, I do assure you, in the pure spirit of moderation and of candor; and, if I might say so in a question of this sort, in the pure spirit of the true principles of Christianity; that is, of wishing that all mankind

should do unto others as they wish to see done unto themselves.

Gentlemen, I wish to call your attention to it seriously, and will just take the liberty of stating why you are called upon to judge in this cause. The question to be tried did not happen within your ordinary jurisdiction. It was not in this county that the offence which is complained of took place; but an application has been made to remove it here; and it is possible that such an application might produce some prejudice in your minds, as if there had been something in the conduct of the party for whom I have the honor to appear, which has made it improper to permit the question to be tried where it arose. The application to remove the cause from Wales to the nearest English county was made upon an affidavit which I have not seen, and was granted by Lord Chief-Justice Kenyon, who undoubtedly exercised his discretion wisely and justly, as he does upon all occasions. He thought that, under the circumstances stated by those concerned for the bishop of Bangor, and upon the affidavit made by those who are prosecuted, without any opposition or interference of any sort or kind whatever by the person who appears here as the prosecutor, that it was fit to remove it. When he did so, I know he removed it to a tribunal of uprightness, of virtue and honor. I know he removed it to a situation

where, I am confident, intelligence and integrity will alike prevail; and I am by no means afraid of the mere circumstance of its being removed having any influence upon minds like yours.

Gentlemen, there may have arisen prejudices in this, as there do arise prejudices in many causes. Undoubtedly, this is not the first time that the matter has been the subject of conversation and discourse; probably it is not the first time that even you, who are impaneled to try the cause, may have heard of it. It is my duty to my client, it is my duty to the public likewise, if there should have been any such conversation about this prosecution, to remove all those prejudices, to remove all the impressions that may have been received, not only from your minds, were it possible you could have received them, but from all those that stand around. I say it is important to my client, and it is important to the cause of public justice, that I should endeavor to remove them.

Gentlemen, I beg leave to state to you, in the temperate spirit which I have professed, that this is not a question in which the general religious establishment of the country is at all involved. It is a question, I can assure you, which is confined to the individuals who appear upon this record. It reaches no further than their conduct on the particular occasion. It is a question which can not, I am sure, have the least effect to the preju-

dice of that doctrine, or to the prejudice of that rank and situation in the state which is so important to the well-being of society, and so essential to bind together, and to sustain, those principles which tend, not only to our happiness hereafter, but to the good government of the world in which we now live. I pledge myself, then, that, when you come to hear this case, you will find that the facts I shall prove are confined singly and solely to the parties named in this indictment.

Gentlemen, there is another circumstance to which I could wish to call your attention, before I enter into the merits of the case, namely, that although a church dignitary stands in the front of those indicted, that is no reason whatever why this indictment should not have been preferred; for if the facts which I have to state to you, and which I shall afterwards prove,—if the principles of law which, under his lordship's direction, I shall have the honor to lay down to you, are correct, you will find that the public justice must be satisfied by a verdict of guilty, notwithstanding the rank and situation of the first individual who is indicted.

It is a painful thing to me, not only on account of his rank and his situation, as a bishop of the church, and as a peer of Parliament, to address you upon a subject of this sort; but it is more so

when I consider that, in the intercourse of my professional life, I have had frequent occasion to see that person discharging duties in another place, in a judicial and legislative capacity. I have often had the honor, and I will say, too, the satisfaction, to address him in that station. Gentlemen, I can assure you that I speak with no personal feelings against the bishop; they are all naturally on the other side. But what is more, I can assure you that my instructions are, to conduct the cause in a pure spirit of temper and moderation, such as I have already described to you.

Gentlemen, this is not the only time that dignitaries of the church have been indicted and found guilty. You have but to look back to the bead-roll of the state trials, and you will find many instances of that sort. You have but to reflect a few years back, when a person, upon an indictment removed in the same manner, though not a bishop, yet a dignitary in the church, was brought into this court, for reasons similar to those which bring you now here to try this indictment. They who heard my learned friend* upon that occasion—they who have read the history of that period, can not forget the uninterrupted stream of splendid eloquence and of powerful ability, which has been rolling on, with increasing force, from that period, to the present moment, and which, then almost

* Mr. Erskine, as counsel for the Dean of St. Asaph.

in its infancy, was exerted in a question similar to that in which I have now the honor to address you, which marks that there was, within our own memory, in this very place, a prosecution of a church dignitary for a misdemeanor, as there is upon the present occasion.

Gentlemen, I will state plainly why this question is tried, and why you are called to deliver a verdict upon it. It is, in the first place, upon principles of public justice, in order that the justice of the country may be satisfied. The prosecution is likewise proceeded in on another principle, which I am sure I am warranted by the law of the land to state as a sound one; it is founded in an honest, fair, justifiable attempt upon the part of this prosecutor, to vindicate his own character through the medium of this prosecution—I say, when I assert that to you, I state a legitimate ground of prosecution, and one that is consistent with the laws of the country; for it is in the power of any individual to use the name of His Majesty for the purpose of public justice; aye, and for the purpose of vindicating his own character and reputation. It is done every day in the case of libel, and may equally be done in case of assault or riot.

The situation of this prosecutor was, and is, that of a person who, by industry in his profession, and in the different situations which he held in the part of the country where this offence was com-

mitted, gained to himself a livelihood. He found himself at once in the eye of that public where he lives, in the circle of that community and society to which he belongs (if he did not take some method of bringing this matter forward to the public observation of the country, and of bringing these defendants forward to receive the public justice of the country), in the risk of being, in all probability, deprived of the honest earnings of his industry, and of the situations which he held for the benefit of himself and the support of his family. These are the principles upon which this prosecution is brought forward; these are principles which do not at all involve any thing of a vindictive spirit; they are principles upon which every honest man daily acts; they are principles upon which every honest man may legally act. Who could have blamed Mr. Grindley if he had brought an action of damages against the bishop for the injury he has suffered? What is the situation in which he stands here—not bringing an action for damages indeed, but preferring an indictment? I will venture to say, that, under the circumstances of this crime, and agreeably to the matter charged in this indictment, a prosecution leaves the defendants more ample means, and a better mode, of defending themselves, than if an action had been brought, and they had been put to plead a justification to that action. These are

the points to which I wish to call your attention, in order that your minds may come coolly, deliberately, and without prejudice, to the trial of this cause.

Gentlemen, the indictment, as you have heard, states that the parties upon this record were guilty of a riot, by entering into and doing certain acts in the office which belonged to the prosecutor, as deputy-registrar of the diocese of Bangor. It states nothing but a riot. There is no count in this indictment singly for a common assault, although it is the common mode, in drawing indictments of this sort, to conclude with the charge of a common assault, with a view of securing a verdict, in case the facts should not come up to the proof of a riot. I wish to call your attention particularly to this, because it shows there was no spirit to catch, by a hair, these parties, for conduct which, if it does not amount to a riot, is not the subject of which this prosecutor means to complain.

It is necessary for me (and I shall do it very shortly, indeed, before I enter into the state of facts which I must lay before you) to explain the law upon the subject of riots. There are various offences which people commit congregated together, which receive different denominations in law, from the simple offence of an affray, up to that of a riot, which it may be well for you to know, in order that you may be able to apply the evidence

when you come to hear it. The case of an affray, is a matter which arises accidentally, without any premeditation or intent. The next in order, is an unlawful assembly: that offence consists in persons assembling together to do some act respecting private property (not concerning the affairs of the public), and separating without doing any act whatever. There is another case, commonly denominated a rout, which is, advancing toward the act, without arriving at it. The highest in order is a riot, in which there must be these ingredients: in the first place, there must be three or more persons engaged in it; in the next place, there must be an intent and purpose in the parties to commit a riot; and in the third place, it is essential that it should have for its object some matter of private concern. When you come to hear the evidence, you will always bear this definition in your mind, which, I am satisfied, my learned friend will not contradict, and I am equally satisfied my lord will support me in, when he comes to address you.

I pledge myself, then, to prove, that the Bishop of Bangor, and the other defendants upon this record, were guilty of that which I have last described—that there were three or more of them; that they committed a riot, in a manner respecting private property; and that they had an original intent and purpose in the act which they did.

With regard to the intent and purpose, you will always observe this, that intent and purpose may either arise from the facts and circumstances that exist at the time of the transaction, which, by inference, establish a necessary presumption of an original intent, or it may be made still more palpable to you by showing a line and tissue of conduct which necessarily involves that intent and purpose, and, therefore, renders presumption unnecessary, by giving you clear, demonstrative, decided proof, arising from the acts and transactions of the parties establishing a premeditated design, intent, and purpose, in the acts which they did. You will find that this last observation will apply, most materially and forcibly, to the evidence I am about to lay before you, and the circumstances I am about to recite.

I profess, gentlemen, again and again, that I have no object in view, but making you understand this case; and if, in the course of my address to you, I either elevate my voice, or give into a manner of action that is contrary to the utmost moderation, I trust you will attribute it to habit, and not to intention. I have no wish but coolly, deliberately, and calmly to make you masters of the facts, the circumstances and principles, upon which this important cause must be decided.

Gentlemen, I have already stated to you, that the prosecutor of this cause was deputy-registrar

of the consistorial court of the diocese of Bangor. It is essentially necessary that I should make you acquainted with the nature of that office, and not only that you should become acquainted with the nature of the offices of registrar and deputy-registrar generally, but that you should likewise be made acquainted with the particular circumstances and local situation of the prosecutor and his office.

The deputy-registrar is appointed by the principal registrar. The general nature of the office of registrar is, that he has the custody of all the archives and muniments that relate to the spiritual court of the diocese; that is, he is to register all the acts of a juridical nature; and he is, besides that, the registrar of all the wills and testaments of the persons who die within the diocese. So that, you observe, it is an office of great importance, and extending to the interest and property of a vast portion of the community; that it is an office where the safe custody of the different archives and muniments is of the utmost consequence. Certainly, according to the law of the land—according to the decided cases to which, if it is necessary, I can refer his lordship—it is competent to appoint a minor to the situation of registrar; and, accordingly, the present bishop of Bangor, upon the resignation of the former principal registrar, did appoint a nephew of his, a minor, to be principal registrar. As it is competent to the

bishop to appoint a minor to be principal registrar, so it is equally competent that that minor should, by some mode, appoint a deputy.

The reason why a minor can, in this case, deviate from the general rule of law, and do an act appointing a deputy, is, because it follows, from necessity, that the business of the office of registrar must be discharged. If the minor could not appoint, of course the duties of the office could not be discharged, and, therefore, *ex necessitate rei*, from the necessity of the case the minor is at liberty to appoint a deputy. But the power of the minor goes no further—there the law stops. The general rule of law is, that a minor can do no act—that he has no will—because he is not supposed to have understanding to act for himself. The exception in this particular case is, that the minor does an act for the purpose of appointing his deputy; but the necessity goes no further. I have it in my power to state to you, from a very recent decision, as well as from the very nature of the thing itself, that this registrar can not remove his deputy; for in this very case an application was made to the Court of King's Bench (and though this may be tedious, it is an important part of this business), an application was made to the Court of King's Bench for a mandamus, calling upon the present prosecutor, Mr. Grindley, to deliver over to a person of the name of Roberts

all the muniments within his power, and to deliver up to him likewise the keys of his office, and thereby give him possession of the place where the business is conducted, and where the muniments are preserved. The result of that application, for the order of the court to compel this to be done, was, that it was denied by the court; and I have the authority to say, from those who heard it, that the ground upon which it was denied was this: Lord Kenyon was of opinion that it was essentially necessary to apply to the Court of Chancery to appoint a proper guardian for the minor, that there might be sufficient authority to appoint another deputy-registrar in the stead of Mr. Grindley; but that he, being in possession of this office, and Mr. Roberts not showing a right to the possession of the office, it was impossible for the court to grant the order applied for.

I have, then, established clearly, in the first place, that Mr. Grindley was in possession of the office; and, in the next place, that there was no legal power to remove him. Consequently, although from necessity the minor may appoint in the first instance, yet, if the office of deputy-registrar is properly discharged, that necessity not existing for the removal, the deputy registrar must remain until the principal arrives at the years of majority, or until he has such a guardian ap-

pointed by the Court of Chancery as is capable of acting in such a subject matter.

Gentlemen, there is one other circumstance I wish to state respecting the law upon this subject, namely, that where a registrar is appointed by the bishop, and a deputy appointed by the registrar, and the principal registrar is a person not in a situation to act, there is no power and authority on the part of the bishop to remove the deputy-registrar. The bishop, by law, has no power or authority whatever to remove the registrar or deputy-registrar, except in the following manner: If the registrar, or his deputy, does any act or acts which are, in their nature, contrary to law; if they do not act consistently with the duties of their office, then, in that case, undoubtedly, the bishop may suspend, but his suspension is confined to "a year or more;" and it has been decided that the words "or more" do not extend indefinitely to any period, but must be confined to a reasonable period subsequent to the year. Gentlemen, I beg you will bear this position of law in your mind, because you will find, throughout the whole of this cause, that the bishop has had no fault whatever to find with Mr. Grindley in the discharge of the duties of his office, for he has never thought him amenable to his jurisdiction for the purposes of suspension; that he must have conceived, therefore, that in the discharge of the

duties of his office, he has acted like an honest, faithful guardian of his public trust. If he had not done so, would not this bishop, who, as I shall prove hereafter, attempted first by art, and afterwards by force, to remove him from that situation, would he not have made use of his suspending power? Would he not, near the period of the minor registrar coming of age—which would have been in less than a year from these transactions—would he not, I say, have suspended him for a year or more, in order that the trust might not have been discharged improperly, by which means, the minor, when he arrived at the age of twenty-one, when he would have the free exercise of his own will, might, according to law, have exercised the power of amotion over his deputy at his pleasure, without assigning any cause whatever for the removal?

Gentlemen, it is material in the discussion of this cause, and most material to your understanding the evidence, that you should know the particular situation of the office; I mean the local situation of the place in which the muniments and records are kept. It is, as I understand, built adjoining to and upon the cathedral church of Bangor; there is a flight of steps rising to it, and you go through a porch, on which there is an outer door. Having got within the porch, there is an inner door opens to the registrar-office; the office

is directly opposite to the bishop's palace; there is nothing but a court-yard between them; and it is so near, that every voice, perhaps, may be heard from the one place to the other. Of that, however, I am by no means certain, but it certainly is within sight of the bishop's palace, adjoining to, and built upon the cathedral.

I have stated the duties of this office; I have shown you that they are grave and serious duties. I have stated the responsibilities of this office; I have shown they are grave and serious responsibilities. I have stated the nature of the muniments kept in this office, and the place in which they are kept; and I contend, I think without the hazard of contradiction by my learned friends, that the person who was thus appointed deputy-registrar was irremovable, except by the mode of suspension by the bishop, in the manner I have mentioned. He was not removable by the minor, but through the medium of a guardian, which guardian must be appointed by the Court of Chancery. The deputy-registrar, thus invested with this office, so charged with those duties and those responsibilities, had as good a right and title to possess that office—to possess the house or place which I have described—to maintain it, to take it again if it was taken from him, and to defend himself in it, as any Englishman has to defend his house, which is emphatically denominated his castle. It

is impossible to compare it more accurately. All the circumstances that belong to the sanctuary of a house belong to the sanctuary of this office. The sanctuary of our house is for our repose, quiet, and security ; it is that we may protect our families. The sanctuary of this office is, not that the family of an individual may be protected, but is for the protection of the interests of an extensive community ; it is, that all the devises of personal estates, that all the records in the office of a legal and a judicial nature, that all the interests of a large and important diocese, may be protected. Then, all the arguments for a man's maintaining and defending the possession of his house apply infinitely stronger to an office charged with such responsibilities. It is impossible that he can secure, it is impossible that he can maintain that, which is essential for him to justify his conduct toward the public, without maintaining possession of the building where these things are preserved ; and every person who attempts to trespass upon it, is a trespasser in the eye of the law ; every person who makes a riot in it is amenable to the justice of his country.

I have described the situation of this office—it is built adjoining to the cathedral ; the wall of it runs into the wall of the cathedral. I have described the nature of it—it is a spiritual office. Is it possible that any thing can amount more nearly

to the description which the great Roman orator gave as the definition of a house: "*Quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civis?*" What can be more holy? What can be more protected by every principle of religion? This is a spiritual office—it is a spiritual office carried on in a building annexed, in local situation, to the cathedral church. Thus annexed by duty, and annexed by situation, it falls in precisely with the comparison I have made; and shows you that this gentleman, Mr. Grindley, was bound, for his own sake—for the sake of the public, with whose interests he was intrusted—for the sake of the community of the diocese to which he belonged—by the sacred situation of the place of office, to possess, and protect his possession in it, that the muniments and the archives might be preserved.

Gentlemen, I am sorry I have detained you so long in the preliminary part of this case. I hope, however, I have not wandered, but have confined myself accurately to the question before you. I think I have done no more than laid that ground which is necessary for your understanding the facts; and I now come to state to you, precisely and accurately, what the nature of those facts is. I told you, originally, that I aim only at distinctness. If I have that quality, I have every thing I can wish. In order to be distinct, and in order to

show you with what mind and intent this riot was committed, I anxiously entreat your attention to the commencement of the connection between Mr. Grindley and the bishop of Bangor.

Early in the year 1792, Mr. Grindley was appointed agent for the Bishop of Bangor. In the month of February of that year, the bishop appointed his nephew, a minor, to the situation of registrar of the consistorial court of the diocese. In the month of March, 1792, Mr. Grindley was appointed deputy-registrar. He continued to act in the situation of deputy-registrar down to the year 1794, when, for the first time, he saw the minor, who confirmed the appointment, and who treated him as his deputy registrar. The bargain was, that Mr. Grindley was to pay his principal seventy pounds a year. He discharged the regular payments. He continued to act in his office, without any offence to the bishop; and that he had committed no offence in his office is clear, otherwise he, the bishop, must have suspended him. He continued, I say, to act in the discharge of the duties of his office down to the autumn of 1795. Here, then, begins the history which gives origin to this prosecution.

The approach of the general election led the Bishop of Bangor to think that he might, perhaps, be serviceable to some of his friends; and he thought those immediately under him were

likely to be influenced by him. He applied to Mr. Grindley, for his interests in the county of Caernarvon. His application did not meet with the reception, or with the answer, he expected. Mr. Grindley thought, as I hope every Englishman thinks, that he had a right to the free exercise of his franchise, and the free exercise of his influence; but although he thought so, I can assure you that he behaved with great temper and moderation. Mr. Grindley now found, that his connection with the bishop became a connection that was not so comfortable, if they were not to agree in their election interests; he thought it right, therefore, to resign the office of agent to the bishop; and he accordingly resigned his place of agent in the month of January. At the time he did so, he signified expressly, that on the 22nd of February, he would resign the office of deputy-registrar. Now could anything be more moderate? You may, perhaps, ask why he did not resign the office of deputy-registrar at the time he resigned the situation of agent? The reason he assigned was this, and it is a valid and substantial reason—that his year of appointment as registrar ended upon the 22nd of February, 1796; that, by retaining the office till that time, he should be enabled to make up his accounts, to settle all his business, and then he would quietly take his departure from it. Could anything be more

moderate, could any thing more be wished for by the bishop? If this registrar had become obnoxious to him, because he did not obey him in matters with which the bishop, I must say, ought to have had no interference, either as a bishop or as a lord of Parliament; if he wished to get rid of Mr. Grindley, might he not have had that patience which ought peculiarly to belong to the character of those who appear as defendants upon this indictment? Might he not have had patience but for a little month, till the deputy-registrar voluntarily resigned his office? There is something in this conduct of the bishop, which it is almost impossible to account for, unless one were to dive into those speculations which have led one to know what the motives and what the feelings of men are, in different situations of life, and in different characters in society.

I recollect a very profound and a very wise saying, equally true as wise, with respect to the clergy. It was said of them, "That, they had found, what Archimedes only wanted, another world, on which to fix their fulcrum by which they moved this world at their pleasure." That saying will go far to expound this conduct. In all spiritual matters, it is a wise, a just, a true maxim, calculated to show the true principles upon which the clergy possess, and truly and justly, and eminently and beneficially to the society

in which we live, possess that influence upon mankind which ought to belong to their character and situation in all spiritual affairs; but when they travel from spiritual to temporal concerns—when they quit the affairs of the other, and look only to the concerns of this world; when they interfere in politics above, or in elections below, then that character, which directs their influence in their clerical function, unfortunately, follows them into their temporal concerns. If they are disappointed, they cannot brook it. They have been taught to regard mankind as persons whom they are to govern at their pleasure—they are incapable of smoothing the matter over, as men more accustomed to the ordinary concerns of life are; and their spiritual power uniformly follows them into temporal concerns, if they are imprudent enough to mix in them. This is vouched by the history of the world in all ages; it is vouched peculiarly by the history of this country. Who ever heard of Sherlock or Lowth interfering in such matters? No; they were enabled to move this world at their pleasure, because their lives were spiritual and holy. Who has not heard that Wolsey and Laud were of a different character and description? The *ego et rex meus* of Wolsey, and the violence of Laud, against the privileges of the people of England, are equally to be collected from that witty, wise, and just maxim to which I

have alluded. Such is the situation of the persons concerned. Gentlemen, it does not signify whether the scene is in the world at large, or in the county of Caernarvon; whether it is transacted in the palace of Whitehall, or in the churchyard of Bangor; the same causes, in the hand of the Supreme Being, directing this world to its good, will always produce the same effects; and I can not account for the bishop not having accepted of this moderate, of this attentive, of this happy proposition (I might almost say, if it had been accepted) of the deputy-registrar, but that he had deviated from, what he does not, I am sure, often deviate from—from spiritual to temporal concerns—that he had forgot the concerns of that pure and humble religion of which he is an eminent pastor, and that he had been drawn aside by the peculiar interest of friendship, by the strong ties of connection, or by something else, in order to act in the manner which I have described to you.

In fact, the resignation has not been made at all; and the transactions which I am about to relate will show the reasons why it has not been made, and will prove that it was not possible to have been made with safety. Mr. Grindley found the bishop had become hostile to him—he found he was no longer safe in resigning it into hands that could not legally accept the resignation—he found he could not have that confidence which would

have taken place if it had been left to his own freedom and choice—and that, after he had resigned into the hands of a minor, he would, in point of law, have retained all the responsibilities of the office, without being, in fact, in the office to discharge the duties: therefore it is he has not resigned the office. But the transaction which I am about to state to you, and I am now come to the real question in the cause (though I humbly think, under his lordship's direction, that nothing I have said is irrelevant)—the transaction I am about to state to you will unfold the whole.

Between the fourth and the eighth of January, 1796, which you see was a month previous to the term of the proposed resignation, these transactions took place. First of all, the bishop, in the absence of Mr. Grindley, the deputy-registrar, sent for the seals; and he obtained one seal. I think the other seal Mr. Grindley's clerk had not in his possession, and it was not delivered. This was intimated to Mr. Grindley; and Mr. Grindley, imagined that the bishop, having obtained one seal, might possibly attempt to obtain the keys; he, therefore, being at that time in Anglesey, wrote to his clerk to beware not to give the bishop the key of the office if he asked for it. The bishop did ask for it, and was refused. Upon the 7th of January Mr. Grindley returned, and found that his office had been broken into. He ascer-

tained, as I shall prove, from the bishop's own mouth, that the bishop had given directions to break open the window of the office, to take the locks off the door, and put on other locks. In this situation Mr. Grindley found himself, respecting an office for the duties of which he was legally responsible; for he is, both in law and fact, deputy-registrar, and has been so from the year 1792 down to the present time, without any attempt to to cast a slur on his character in the discharge of his duties.

Gentlemen, I come now to the principal facts; and I can assure you I will act in the spirit which I professed at the outset. I wish to state every thing candidly to you; I have nothing to hold back. I do not mean to say that, upon every occasion, it is possible to justify persons in their transactions for moderation and for prudence; and yet, I think, when you examine the transactions of Mr. Grindley, you will see, under all the circumstances, that they were neither immoderate nor imprudent. Mr. Grindley's offer of resignation had been scoffed at and rejected. He had been treated in such a way as to make it natural to suppose that he would be exposed as a culprit in the discharge of his duty, to the whole community to which that duty appertains. He found that it was essentially necessary for him to know in what state the muniments and archives were, which he alone

had a right to the possession of. He found the means of entrance debarred, and, therefore, determined to get admission to the office; and, having got admission, he determined to maintain himself in the possession of it, as he had a full right to do.

In the morning of the 8th of January, Mr. Grindley went to the office, with the means of getting admittance into it. You will observe that the first attempt to get possession of the office had been on the part of the bishop. You will always recollect that the bishop has no earthly right to the possession of the muniments of that office as long as the registrar properly discharges the duty of the office. He has no right to keep the registrar out of his office, but the registrar has a right to keep all mankind out of it except those who come upon business, and except the bishop when he comes in the discharge of his duty as bishop of Bangor. Mr. Grindley imagined from the violence that had taken place before, that is to say, from the violent breaking into the office originally, and from the offer of compromise on his part, and even of resignation, being wholly rejected, he imagined, and it was natural so to imagine, that force would be opposed to force when he once got possession of his office, and therefore, undoubtedly, Mr. Grindley went provided so as to secure himself against the possibility of that force depriving him of his office. Gentlemen, I insist, that when he

was in possession of his office he had a right so to do. All this will be proved—I say it will be proved, because I know Mr. Grindley, who is the first witness, is a person beyond the suspicion of not acting agreeable to his oath. The oath is, “that he shall speak the truth, the whole truth, and nothing but the truth.” It has been uniformly expounded, that a person who does not speak the whole truth in a court of justice, is as criminal as he who speaks a direct falsehood. I feel myself bound in duty and in conscience, as an advocate, to state to you the whole truth; and Mr. Grindley is a man of that conscience that he will speak the whole truth in the manner in which the thing happened. It will then be for you to judge, under all the circumstances; and I think that whatever opinion you may form with regard to Mr. Grindley’s rashness in his manner of getting possession of the office, and his determination to maintain possession of it, you will be convinced that the bishop and those indicted were in fact guilty of a riot, for endeavoring to get possession of it, and coming and interrupting him in the manner I shall describe and prove.

Mr. Grindley went with pistols in his pocket; but it will be proved these pistols were unloaded. Now, I can assure my friends (whatever gestures they may make), that I am not the least afraid of this fact. I say his going with unloaded pistols

proves that he had in regard to getting possession of the office no intent of offence whatever. He took powder and shot, with which, when he got possession, he loaded his pistols, which proves that he was determined, being in peaceable possession of his office, to maintain that possession; and I contend that the deputy-registrar of the diocese, under the circumstances I state, had a right to do so. I say that every argument, every fact which applies to the case of a man's own house being his castle, applies to this case. Mr. Grindley, after he had opened the outer door in the porch, in order to prevent any riot, and for the purpose of intimidation, threatened one of the persons who came from the bishop's house to interrupt him, with an unloaded pistol; for it will be proved that the pistols were loaded at a subsequent time. After this first attempt to disturb him there was a considerable interval; and during this interval Mr. Grindley got into the inner door. Mr. Grindley being thus in the office, the bishop and various of his servants arrived. The bishop hallooed with a voice so loud (as will be proved to you) that Mr. Grindley did not know it; his passion was so vehement that it was absolutely impossible to distinguish his voice. The moment Mr. Grindley knew it was the bishop, he said he had no objection to the bishop's being let in, and he desired his servants quietly and peaceably to retire to a

further corner of the room. Mr. Grindley then came forward and said that whatever business was to be done, he was ready to do it; that he considered himself as the legal officer, and he was then in the quiet possession of his office; that with regard to his lordship he was perfectly willing he should come into the office, but he begged that his lordship's boisterous and tumultuous conduct might cease. I really wish rather that the witnesses should describe what passed afterwards than that I should. But instead of that tumultuous conduct ceasing, the bishop approached first to Mr. Grindley, afterward to his servants, with threatening gestures, and with threatening words, laying his hands upon them; and he was assisted by the four other persons indicted, who afterwards came into the office, whose actions and words were precisely of the same kind and description.

Gentlemen, one of the grounds of riot which you have to try is this, that here was a person, legally entitled to the possession of his office, illegally forced from that office; he had taken possession of this office, and remained in the quiet possession of it. Now, whether he did so in a manner that a perfectly calm and unconcerned spectator may approve of, as an abstract case, I do not know; but I am addressing myself to persons who have human passions—I am addressing myself to gentlemen who know what human nature

is; and I am sure that in an outrage of this sort, committed after a voluntary offer of resignation, such as I have stated—after a conduct so peaceable and quiet—even a worm, if trod upon, would have turned again. Mr. Grindley had got quietly into the possession of his office; and then, after a lapse of time, this office was again attacked in the riotous, tumultuous, and extraordinary manner which the witnesses will state, but which I forbear detailing, because, in the first place, it is unnecessary for your understanding the cause, and, in the next place, it is painful for me to state it. This disturbance went on a considerable time; and at last it ended only by persons, whose sex and character I have too great a respect for to introduce them into the cause, more than just to say, that, by the intervention of Mrs. Warren and two ladies, the bishop was at last quieted from his passion, and withdrawn from the riot. There the business ended. Gentlemen, this is the case which you have to try; and I think I can venture to say, that if the facts are proved in the manner I have described, and I take it upon me to say I have stated them most correctly, it is impossible for you not to find a verdict for the prosecutor.

Gentlemen, it would be in vain, and an absurd thing in me, to detain you with any particular address to yourselves. I have the honor of knowing hardly any of you personally although among the

jury there are some gentlemen whom I have had an opportunity of seeing in another scene in life. I know your characters, and I know that, however you may feel yourselves bound to protect the ministers of our church—though I think this prosecution can have no effect upon any but the particular churchmen engaged in this transaction—that you will yet guard yourselves against deviating from those principles according to which you are bound to act, and that you will find according to the evidence.

Gentlemen, there is no principle implanted in the human mind stronger than the sympathy which we feel for the situation and sufferings of persons of high rank and condition; it is one of those principles that bind society together; and is most admirably infused into our nature, for the purposes of good government, and the well-being of civil order. But whatever the rank may be, that rank can never stand between a defendant and the proof of the fact, with a jury of Englishmen. They know their duty too well. Neither compassion, sympathy, nor any other principle, can possibly affect their minds. Consider what is the peculiar situation of these defendants; reflect that they are set apart by the laws of the land, and the regulations of the Christian religion, for the purpose of preaching the doctrines of Christ. Our law has been so peculiarly cautious with re-

spect to their character, that even when it empowers the civil magistrate to quell a riot by calling to his assistance every other member of the community, it peculiarly excepts, with women and children, the clergy. I have brought before you persons of that description, who, instead of claiming an exemption from being called upon, have themselves been guilty of a riot; for which they are justly amenable to the laws of their country.

After the examination of the witnesses, and the close of the prosecutor's case, Mr. Erskine spoke as follows:

SPEECH OF MR. ERSKINE.

GENTLEMEN OF THE JURY: My learned friend, in opening the case on the part of the prosecution, has, from personal kindness to me, adverted to some successful exertions in the duties of my profession, and particularly in this place. It is true that I have been in the practice of the law for very many years, and more than once, upon memorable occasions, in this court; yet, with all the experience which, in that long lapse of time, the most inattentive man may be supposed to have collected, I feel myself wholly at a loss in what manner to address you. I speak unaffectedly when I say, that I never felt myself in so complete a state of embarrassment in the course of my professional life; indeed, I hardly know how to collect my faculties at all, or in what fashion to deal with this most extraordinary subject. When my learned friend, Mr. Adam, spoke from himself, and from the emanations of as honorable a mind as ever was bestowed upon any of the human species, I know that he spoke the truth when he declared his wish to conduct the cause with all charity, and in the true spirit of Christianity. But his duties were scarcely compatible with his intentions; and we shall, therefore, have, in the

sequel, to examine how much of his speech was his own candid address, proceeding from himself, and what part of it may be considered as arrows from the quiver of his client. The cause of the bishop of Bangor can suffer nothing from this tribute, which is equally due to friendship and to justice; on the contrary, I should have thought it material, at any rate, to advert to the advantage which Mr. Grindley might otherwise derive from being so represented. I should have thought it right to guard you against blending the client with the counsel. It would have been my duty to warn you not to confound the one with the other, lest, when you hear a liberal and ingenuous man dealing, as he does, in humane and conciliating expressions, and observe him with an aspect of gentleness and moderation, you might be led by sympathy to imagine that such were the feelings, and that such had been the conduct, of the man whom he represents. On the contrary, I have no difficulty in asserting, and I shall call upon his lordship to pronounce the law upon the subject, that you have before you a prosecution set on foot without the smallest color or foundation—a prosecution hatched in mischief and malice, by a man who is, by his own confession, a disturber of the public peace, supported throughout by persons who, upon their own testimony, have been his accomplices, and who are now leagued with him in

a conspiracy to turn the tables of justice upon those who came to remonstrate against their violence, who honestly, but vainly, endeavored to recall them to a sense of their duty, whose only object was to preserve the public peace, and to secure even the sanctuaries of religion from the violation of disorder and tumult.

What then is the cause of my embarrassment? It is this. In the extraordinary times in which we live, amidst the vast and portentous changes which have shaken and are shaking the world, I can not help imagining, in standing up for a defendant against such prosecutors, that the religion and order under which this country has existed for ages had been subverted; that anarchy had set up her standard; that misrule had usurped the seat of justice, and that the workers of this confusion and uproar had obtained the power to question their superiors, and to subject them to ignominy and to reproach for venturing only to remonstrate against their violence, and for endeavoring to preserve tranquility by means not only hitherto accounted legal, but which the law has immemorially exacted as an indispensable duty from all the subjects of this realm. Hence it really is that my embarrassment arises. And, however this may be considered as a strong figure in speaking, and introduced rather to captivate your imaginations, than gravely to solicit your judgment, yet, let me

ask you whether it is not the most natural train of ideas that can occur to any man, who has been eighteen years in the profession of the English law?

In the first place, gentlemen, who are the parties prosecuted and prosecuting? What are the relations they stand in to each other? What are the transactions as they have been proved by themselves? What is the law upon the subject, and what is the spirit and temper, the design and purpose of this nefarious prosecution?

The parties prosecuted are the right reverend prelate whose name stands first upon the indictment, and three ministers and members of his church, together with another who is added (I know not why) as a defendant. The person prosecuting is — how shall I describe him? for surely my learned friend could not be serious when he stated the relation between this person and the bishop of Bangor. He told you, most truly, which renders it less necessary for me to take up your time upon the subject, that the bishop is invested with a very large and important jurisdiction; that, by the ancient laws of this kingdom, it extends to many of the most material objects in civil life—that is, has the custody and recording of wills, the granting of administrations, and a jurisdiction over many other rights of the deepest moment to the personal property of the King's subjects. He told

you also, that all these complicated authorities, subject only to the appellate jurisdiction of the metropolitan, are vested in the bishop. To which he might have added (and would, no doubt, if his cause would have admitted the addition), that the bishop himself, and not his temporary clerk, has, in the eye of the law, the custody of the records of his church; and that he also is the person whom the law looks to for the due administration of every thing committed to his care; his subordinate officers, being, of course, responsible to him for the execution of what the law requires at his hands.

As the King himself, who is the fountain of all jurisdictions, can not exercise them himself, but only by substitutes, judicial and ministerial, to whom, in the various subordinations of magistracy, his executive authority is delegated; so, in the descending scale of ecclesiastical authority, the bishop also has his subordinates to assist him judicially, and who have again their subordinate officers and servants for the performance of those duties committed by law to the bishop himself, but which he exercises through the various deputations which the law sanctions and confirms.

The Consistory Court, of which this man is the deputy-registrar, is the bishop's court. For the fulfilment of its duties, the law has allowed him his chancellor and superior judges, who have under

them, in the different ecclesiastical divisions, their surrogates, who have again their various subordinates, the lowest, and last, and least of whom, is the prosecutor of this indictment; who, nevertheless, considers the cathedral church of Bangor, and the court of the bishop's see, as his own castle; and who, under that idea, asserts the possession of it, even to the exclusion of the bishop himself, by violence and armed resistance! Do you wonder now, gentlemen, that I found it difficult to handle this preposterous proceeding? The registrar himself (putting deputation out of the question) is the very lowest, last, and least of the creatures of the bishop's jurisdiction, without a shadow of jurisdiction himself, either judicial or ministerial. He sits, indeed, amongst the records, because he is to register the acts which are there recorded; but he sits there as an officer of the bishop; and the office is held under the chapter part of the cathedral, and within its consecrated precincts, where the bishop has a jurisdiction independent of all those which my friend has stated to you — a jurisdiction given to him by many ancient statutes, not merely for preserving that tranquillity which civil order demands every where, but to enforce that reverence and solemnity which religion enjoins within its sanctuaries, throughout the whole Christian world.

Much has been said of the registrar's freehold

in his office ; but the term which he has in it—viz., for life—arose originally from an indulgence to the bishop who conferred it ; and it is an indulgence which still remains, notwithstanding the restraining statute of Elizabeth. The bishop's appointment of a registrar is, therefore, binding upon his successor ; but how binding ? Is it binding to exclude the future bishop from his own cathedral ? Is it true, as this man preposterously supposes, that, because he chooses to put private papers of his own where no private papers ought to be, because he thinks fit to remove them from his own house and put them into the office appointed only for the records of the public, because he mixes his own particular accounts with the archives of the diocese, that therefore, forsooth, he has a right to oust the bishop from the offices of his own court, and, with pistols, to resist his entrance, if he comes even to enjoin quiet and decency in his church ? Surely bedlam is the proper forum to settle the rights of such a claimant.

The bishop's authority, on the contrary, is so universal throughout his diocese, that it is laid down by Lord Coke, and followed by all the ecclesiastical writers down to the present time, that though the freehold in every church is in the parson, yet that freehold can not oust the jurisdiction of the ordinary, who has a right not merely to be

present to visit the conduct of the incumbent, but to see that the church is fit for the service of religion ; and so absolute and paramount is his jurisdiction, that no man, except by prescription, can even set up or take down a monument without his license ; the consent of the parson, though the freehold is in him, being held not to be sufficient. The right, therefore, conferred by the bishop on the registrar, and binding, as I admit it to be, upon himself and his successor, is the right to perform the functions of the office, and to receive the legal emoluments. The registrar may also appoint his deputy ; but not in the manner my learned friend has affirmed, for the registrar can appoint no deputy without the bishop's consent and approbation. My learned friend has been also totally mis-instructed with regard to the late judgment of the Court of King's Bench on the subject. He was not concerned in the motion, and has only his report of it from his client. Mr. Grindley was represented in that motion by a learned counsel who now assists me in this cause, to whom I desire to appeal. The court never pronounced a syllable which touched upon the controversy of to-day ; on the contrary, its judgment was wholly destructive of Mr. Grindley's title to be deputy, for it held that the infant, and not his natural guardian, had, with the bishop's approbation, the appointment of his deputy ; whereas Mr. Grindley was appointed

by his father only, and not by the infant at all, which my friend well knew, and, therefore, gave parol evidence of his possession of the office, instead of producing his appointment, which would have been fatal to his title; and the reason why the court refused the mandamus was, because Mr. Roberts, who applied for it, was not the legal deputy. It did not decide that the prosecutor was the legal officer, but only that Mr. Roberts was not; and it decided that he was not because he had only the appointment of the infant's father, which was, by-the-by, the only title which the prosecutor had himself; and although the infant was a lunatic, and could no longer act in that respect for himself, yet the court determined that his authority did not devolve to the father, but to the Court of Chancery, which has, by law, the custody of all lunatics.

This judgment was perfectly correct, and supports my proposition, that the prosecutor was a mere tenant at will of the bishop. The infant can, indeed, appoint his deputy, but not *ex necessitate rei*, as my friend supposes; on the contrary, he will find the reason given by the Court of King's Bench as far back as the reign of Charles the First, as it is reported by that great magistrate, Mr. Justice Coke. It is there said that an infant can appoint a deputy, because the act requires no discretion, the approbation, which is tantamount to

the choice, being in the bishop. The continuance must, therefore, in common sense, be in the bishop also; for otherwise, the infant, having no discretion, a proper person might be removed indiscreetly, or an improper person might never be removed at all. I maintain, therefore, on the authority of the ancient law, confirmed by the late decision of the Court of King's Bench, in this very case, that the prosecutor, who is so forward to maintain a privilege which he could not have maintained even if he had been judge of the court and chancellor of the diocese, had, in fact, no more title to the office than I have. He tells you himself, that he never had any appointment from the infant, but from the father only, with the infant's and the bishop's approbation; in other words, he was the deputy *de facto*: but as such, I assert, he was a mere tenant at will; and, consequently, became to all intents and purposes a private man from the moment the bishop signified his determination to put an end to his office; and that the bishop had signified his determination before the transaction in question, Mr. Grindley has distinctly admitted also. I thought, indeed, I should be more likely to get that truth from him by concealing from him the drift of my examination, and he therefore swore, most eagerly, that the bishop did not offer him the key at the palace, but that, on the contrary, he had told him distinctly that he

was no longer in the office. He says besides, that the bishop expressed the same determination by a letter, in answer to which he had declared his resolution to hold it till the year expired. I say, therefore, that the prosecutor at the time in question was not deputy-registrar, and that the infant being a lunatic, the bishop had a right to give charge of the office till another was duly appointed. This point of law I will put on the record if my friend desires it.

But why should I exhaust myself with this collateral matter, since, in my view of the subject, it signifies nothing to the question we have to consider? It signifies not a farthing to the principles on which I presently mean to rest my defence, whether he was an usurper, or the legal deputy, or the infant himself, with his patent in his hand.

Let us now, therefore, attend to what this man did, whatever character belonged to him. This is principally to be collected from the prosecutor's own testimony, which is open to several observations. My learned friend, who stated to you, in his absence, the evidence he expected from him, explained, with great distinctness, the nature and obligation of an oath; and, speaking from his own honest sensations, and anticipating the evidence of his client, from the manner he would, as a witness, have delivered his own, he told you, that you would hear from him a plain, unvarnished state-

ment—that he would keep back from you no circumstance, nor wish to give a color to any part of the transaction. What induced my friend to assure us, with so much solicitude, that his witness would adhere so uniformly to the truth, I can not imagine, unless he thought that his evidence stood in need of some recommendation. All I can say is, that he did not in the least deserve the panegyric which was made upon him, for he did not give an unvarnished statement of the very beginning of the transaction, which produced all that followed. I asked him whether, in refusing the key, he did not mean to keep an exclusive possession of the office, and to prevent the bishop even from coming there? But observe how the gentleman fenced with this plain question. “I did not,” he said, “refuse him the key, but only lest he should take possession.” I asked him again, if he did not positively refuse the key, and desired the answer to be taken down. At that moment my friend, Mr. Manly, very seasonably interposed, as such a witness required to be dry-nursed, and at last he said, “Oh, the key was included.”

The bishop, therefore, was actually and wilfully excluded wholly from the office. For, notwithstanding Mr. Grindley’s hesitation, Mr. Sharpe, who followed him, and who had not heard his evidence, from the witnesses being kept apart, swore distinctly and at once, that the key was taken

from Dodd, because Grindley thought he would let the bishop have it; and the witness said further (I pledge myself to his words): "It was therefore delivered into my custody, and I refused it to the bishop; I did so by Mr. Grindley's direction, undoubtedly."

The very beginning of the transaction, then, is the total exclusion of the bishop from his own court, by a person appointed only to act as deputy, by his own consent, and during his own will, which will he had absolutely determined before the time in question. I am, therefore, all amazement, when it shoots across my mind that I am exhausting my strength defending the bishop, because, most undoubtedly, I should have been counsel for him as a prosecutor, in bringing his opponents to justice. According to this new system, I would have the judges take care how they conduct themselves. The office-keepers of the records of the courts at Westminster are held by patent; even the usher's place of the Court of King's Bench is for life; he too is allowed to appoint his deputy, who is the man that puts wafers into our boxes, and papers into our drawers, and who hands us our letters in the cleft of a stick. But, nevertheless, I would have their lordships take care how they go into the Court of King's Bench, which, it seems, is this man's castle. If Mr. Hewitt were to make a noise and disturb the court, and Lord Kenyon were to

order him to be pushed out, I suppose we should have his lordship indicted at the next assizes for a riot. Suppose any of the judges wishes to inspect a record in the treasury chamber, and the clerk should not only refuse the key, but maintain his possession with pistols, would any man in his senses argue that it was either indictable or indecent to thrust him out into the street; yet, where is the difference between the attendants on a court civil and a court ecclesiastical? Where is the difference between the keeper of the records of the Court of King's Bench, or Common Pleas, and the registrar of the consistory of Bangor?

To all this I know it may be answered, that these observations (supposing them to be well founded) only establish the bishop's right of entry into his office, and the illegal act of the prosecutor in taking an exclusive possession, but that they do not vindicate the bishop for having first taken off the lock in his absence, nor for afterwards disturbing him in the possession which he had peaceably regained; that the law was open to him, and that his personal interference was illegal. To settle this point, we must first have recourse to facts, and then examine how the law applies to them.

It stands admitted, that though Mr. Grindley knew that the bishop had determined his will, and had insisted on his surrender of his situation,

which he never held but by the bishop's sufferance, he absolutely refused the key, with the design to exclude him from the office. It was not till then that the bishop, having no other means of access, ordered the lock to be taken off, and a new key to be made. Now, whether this act of the bishop's was legal or illegal, is wholly beside the question. His lordship is not charged with any force or illegality on that account: he is not accused even in the counsel's speech with any impropriety in this proceeding, except an intrusion into this imaginary castle of Mr. Grindley. It is admitted, in short, that the bishop took a possession altogether peaceable.

His lordship, then, having removed the deputy-registrar, without due authority, if you please, and being, if you will, (for any thing which interests my argument) in possession contrary to law, let us see what follows. And in examining this part of the evidence, upon which, indeed, the whole case depends, I am not driven to the common address of a counsel for a defendant in a criminal prosecution—I am not obliged to entreat you to suspend your judgments till you hear the other side; I am not anxious to caution you to withhold implicit credit from the evidence till the whole of it is before you; no, gentlemen, I am so far from being in that painful predicament, that, though I know above half of what you have

heard is not true; although I know that the transaction is distorted, perverted and exaggerated in every limb and member; yet I desire that you will take it as it is, and find your verdict upon the foundation of its truth. Neither do I desire to seduce your judgments, by reminding you of the delicacy of the case. My friend declares he does not know you personally, but that he supposes you must have a natural sympathy in protecting a person in the bishop's situation against an imputation so extremely inconsistent with the character and dignity of his order. It is natural, as decent men, that you should; and I, therefore, willingly second my learned friend in that part of his address. I solemnly conjure you, also, to give an impartial judgment. I call upon you to convict, or acquit, according to right and justice. God forbid that you should not! I ask no favor of my client because he is a prelate, but I claim for him the right of an English subject, to vindicate his conduct under the law of the land.

The bishop, then, being in peaceable possession, what is the conduct of the prosecutor, even upon his own confession? He sends for three men; two of whom he calls domestics—one of them is his domestic blacksmith. He comes with them and others to the office with pistols, and provided with powder and shot. Now, *quo animo* did they come? I was really so diverted with the nice dis-



tion of Mr. Grindley, in his answer to this question, that I could scarcely preserve my gravity. He said, "I came, it is true, with pistols, and with powder and shot, to take possession; but, mark, I did not load my pistols in order to take possession; I did not load them till after I had it, and then only to keep the possession I had peaceably taken." This would be an admirable defence at the old Bailey. A man breaks into my house, in the day, to rob me of my plate * (this is but too apt a quotation, for so I lost the whole of it); but this felon is a prudent man, and says to himself, I will not load my fire-arms till I have got into the house and taken the plate, and then I will load them, to defend myself against the owner, if I am discovered. This is Mr. Grindley's law; and, therefore, the moment he had forced the office, he loaded his pistols, and called aloud, repeatedly, that he would blow out the brains of the first man that entered. A pistol had before been held to the breast of one of the bishop's servants, and things were in this posture when the bishop came to the spot, and was admitted into the office. The lock which he had affixed he found taken off, the doors forced open, and the apartment occupied by armed men, threatening violence to all who should oppose them.

* It seems Lord Erskine's house, in Serjeant's Inn, had been recently broken open, and his plate all stolen.

This is Mr. Grindley's own account. He admits that he had loaded his pistol before the bishop came; that he had determined to stand, *vi et armis*, to maintain possession by violence, and by death if necessary; and that he had made that open declaration in the hearing of the bishop of the diocese. Perhaps Mr. Grindley may wish, hereafter, that he had not made this declaration so public, for whatever may be the bishop's forbearance, the criminal law may yet interpose by other instruments, and by other means. Indeed, I am truly sorry to be discussing this matter for a defendant in July, which ought to have been the accusation of a prosecutor six months ago if the public peace of the realm had been duly vindicated.

The bishop, then, being at the door, and hearing his office was taken possession of by force, and by the very man whom he had displaced, the question is, did he do more than the law warranted in that conjuncture? I maintain, that from overbearance, he did much less. If, in this scene of disorder, the records of the diocese had been lost, mutilated, or even displaced, the bishop, if not legally, would at the least have been morally responsible. It was his duty, besides, to command decency within the precincts of his church, and to remove at a distance from it all disturbers of the peace. And what, after all, did the bishop do?

He walked up and down remonstrating with the rioters, and desiring them to go out, having before sent for a magistrate to act according to his discretion. It is true Mr. Grindley worked himself up to say that the bishop held up his fist so [describing it], but with all his zeal he will not venture to swear he did so with a declaration, or even with an appearance of an intention to strike him. The whole that he can screw up his conscience to is, to put the bishop in an attitude which is contradicted by every one of his own witnesses, who all say that the bishop seemed much surprised, and walked to and fro, saying, "This is fine work!" and moving his hands backwards and forwards, thus [describing it]. Does this account at all correspond with Mr. Grindley's? or does it prove an attitude of force, or even an expression of passion? On the contrary, it appears to me to be the most natural conduct in the world. They may fancy, perhaps, that they expose the bishop when they impute to him the common feelings, or, if you please, the indignation of a man, when all order is insulted in his presence, and a shameless outrage committed in the very sanctuary which he is called upon by the duty of his office, and the dignity of his station, to protect. But is it required of any man, either by human nature or by human laws (whatever may be the sanctity of his character), to look at such a proceeding unmoved? Would

it have been wrong or indecent if he had even forcibly removed them? I say it was his duty to have done so whoever were the offenders; whether the deputy-registrar, the registrar himself, or the highest man in the kingdom.

To come at once to the point: I maintain that at the time the bishop came to the door, at which very moment Grindley was threatening to shoot the first person that entered, which made somebody say, "Will you shoot the bishop?" I maintain, at that very moment three indictable offences were committing, which put every man upon the level of a magistrate, with regard to authority, and even prescribed a duty to every man to suppress them. In the first, there was an affray; which my friend did not define to you, but which I will. Mr. Serjeant Hawkins, transcribing from the ancient authorities, and whose definition is confirmed by every day practice, defines an affray thus: "It is an affray, though there is neither actual violence, nor threat of violence, where a man arms himself with dangerous weapons in such a manner as will naturally cause terror;" and this was always an offence at common law, and prohibited by many statutes.

Let us measure Mr. Grindley's conduct, upon his own account of it, by the standard of this law, and examine whether he was guilty of an affray. He certainly threatened violence, but I will throw

him in that, as I shall examine his threatening when I present him to you in the character of a rioter. I will suppose, then, that he threatened no violence ; yet he was armed with dangerous weapons in such a manner as would naturally create terror. He tells you, with an air of triumph, that he bought the arms for that express purpose, and that he dispersed those who came to disturb him in his castle. He was, therefore, clearly guilty of an affray.

Let us next see what the law is as it regards all the King's subjects when an affray is committed. The same authorities say (I read from Mr. Serjeant Hawkins, who collects the result of them), "that any private man may stop and resist all persons engaged in an affray, and remove them ; that if he receive a hurt in thus preserving the peace, he may maintain an action for damages ; and that if he unavoidably hurt any of the parties offending in doing that which the law both allows and commends, he may well justify it, for he is no ways in fault." Setting aside, therefore, the office and authority of the bishop, and the place where it was committed, and considering him only as a private subject, with no power of magistracy, he had a right to do, not that which he did (for in fact he did nothing), he had a right to remove them by main force, and to call others to assist in removing and securing them. The bishop, how-

ever, did neither of these things; he took a more regular course, he sent for a magistrate to preserve the peace—he had, indeed, sent for him before he came himself;—yet, they would have you believe that he went there for an illegal purpose—as if any man who intended violence would send for a magistrate to witness the commission of it. When the magistrate came, Mr. Grindley thought fit to behave a little more decently; and so far was the bishop from acting with passion or resentment, that when those about him were desirous of interfering, and offered their services to turn them out, he said to them, “No! let the law take its course in due season.” His lordship, by this answer, showed a greater regard for peace than recollection of the law; for the course of the law did warrant their forcible removal; instead of which, he left the prosecutor, with arms in his hands, in a possession taken originally by force, and forcibly maintained.

Let us next examine if the prosecutor and his witnesses were engaged in a riot. My learned friend will forgive me if I remind him that there is one part of the legal definition of a riot which he omitted. I will, therefore, supply the omission from the same authorities: “A riot is, where three persons or more assemble together with an intent, mutually, to assist one another against any who shall oppose them in the execution of some

enterprise of a private nature, and afterwards actually execute the same in a turbulent manner, to the terror of the people, whether the act intended be legal or illegal." But the same authorities add, very properly: "It is clearly agreed, that in every riot there must be some such circumstances, either of actual force and violence, or of an apparent tending to strike terror into the people, because a riot must always be laid *in terrorem populi*." This most important part of the definition of a riot, which my friend prudently omitted, points, directly and conclusively, upon the conduct of his own client, and completely excludes mine. The prosecutor and his witness did assemble mutually to support one another, and executed their purpose with arms in their hands, and with threats and terror; which conclusively constitutes a riot, whether he was registrar or not, and whatever might be his right of possession. The bishop, on the other hand, though he might have no right to remove the prosecutor, nor any right to possession, could not possibly be a rioter, for he came without violence or terror, or the means of either, and, if he had employed them, might lawfully have used them against those who were employing both.

Let us now further examine whether I was right in maintaining that there was an aggravation from the place where the offence was committed, and

which invested the bishop with a distinct character and authority.

By the statute of Edward the Sixth, if persons come tumultuously within the consecrated precincts of the church, the ordinary has not only a right to repress them, but he may excommunicate the offenders, who are, besides, liable to a severe and ignominious temporal punishment, after a conviction on indictment, even for an indecent brawling within the precincts of the church, without any act at all which would amount to a riot or an affray.

Let us then, for a moment, reflect how these solemn authorities, and any possible offence in the reverend prelate, can possibly be reconciled; and let us contemplate, also, the condition of England, if it be established as a precedent upon the fact before you, that he is amenable to criminal jurisdiction upon this record. A riot may arise in the street, the moment after your verdict is pronounced, by persons determined to take and to maintain some possession by force. I may see or hear armed men threatening death to all who shall oppose them; yet I should not venture to interpose to restore the peace, because I can not try their titles, nor examine to which of the contending parties the matter in controversy may belong. If this new doctrine is to be established, ask yourselves this question: Who will in future interfere

to maintain that tranquility which the magistrate may come too late to preserve, if the rein is given to disorder in the beginning? Although dangerous violence may be committing, though public order may be trampled down within his view, a wise man will keep hereafter within the walls of his own house. Though fearless of danger to his person, he may yet justly fear for his reputation, since, if he only asks what is the matter, and interposes his authority or counsel, he may be put by the rioters into an attitude of defiance, and may be subjected to the expense and degradation of a prosecution! The delicate situation of the bishop, at this moment criminally accused before you, is admitted; but it is hardly more, gentlemen, than would attach upon persons of many other descriptions. The same situation would not be much less distressing to a judge, to a member of Parliament, or to any of you, gentlemen, whom I am addressing. What would be the condition of the public, or your own, if you might be thus dragged to the assizes as rioters, by the very rioters which your duty had driven you to offend? I assert that society could not exist for an hour, if its laws were thus calculated to encourage its destroyers, and to punish its protectors.

Gentlemen, there is no man loves freedom better than I do; there is no man, I hope, who would more strenuously oppose himself to proud and

insolent domination in men of authority, whether proceeding from ministers of the church, or magistrates of the state. There is no man who would feel less disposed to step beyond my absolutely imposed duty as an advocate, to support oppression, or to argue away the privileges of an Englishman. I admit that an Englishman's house is his castle; and I recollect and recognize all the liberties he ought to enjoy. My friend and I are not likely to differ as to what an Englishman's freedom consists in. The freedom that he and I love and contend for is the same. It is a freedom that grows out of, and stands firm upon, the law—it is a freedom which rests upon the ancient institutions of our wise forefathers—it is a freedom which is not only consistent with, but which can not exist without, public order and peace—and, above all, it is a freedom cemented by morals, and still more exalted by a reverence for religion, which is the parent of that charity, humanity, and mild character, which has formed for ages the glory of this country.

Gentlemen, my learned friend takes notice that this cause has been removed from its primitive tribunal in order to be tried before you at Shrewsbury. He tells you he never saw the affidavit that was the foundation of its removal; which, however, he, with great propriety, supposes contained matter which made it appear to Lord

Kenyon to be his duty to withdraw the trial from its proper forum in Wales. But he is instructed by Mr. Grindley to deny that any thing was done, either by himself or any other person connected with him, to prejudice that tribunal, or the country which was to supply it. I, on the other hand, assert that, upon the prosecutor's own evidence, greater injustice and malice never marked any judicial proceeding. I have in my^{own} hand a book (no matter by whom written) circulated industriously through all Wales, to prejudice the public mind upon the very question before you. But Mr. Grindley, it seems, is not responsible for the acts of this anonymous libeler. How far he is responsible, it is for you to judge. It is for you to settle how it happened that the author of this book should have it in his power minutely to narrate every circumstance which Mr. Grindley has himself been swearing to, and that he should happen, besides, to paint them in the very same colors, and to swell them with the same exaggerations with which they have been this morning accompanied. It will be for you to calculate the chances that should bring into the same book, under inverted commas, a long correspondence between the bishop of Bangor and this very person. Gentlemen, he admits, upon his oath, "that he furnished the materials from whence that part of the work, at least, might have reached the

author;" and from thence it will be for you to guess what share he had in the remainder. All I know is, that from that time forward the bishop's character has been torn to pieces, not from this pamphlet alone, but by a pestilential blast of libels, following one another, so that it has been impossible to read a newspaper without having announced to us this miserable cause, and the inquiries forsooth to be instituted in Parliament, which were to follow the decision. Gentlemen, the same spirit pursues the cause even into this place, proceeding from the same tainted source. My friend tempers his discourse with that decorum and respect for religion which is inseparable from the lips of so good a man. He tells you, that it has been wittily said of the clergy, and his client desires him to add, "truly too," that the clergy have found what Archimedes wished for in vain, "a fulcrum, from whence to move the world." He tells you, "that it is recorded of that great philosopher, that he desired but to have a fulcrum for his engine to enable him to accomplish it." "Churchmen," says Mr. Grindley, by the mouth of Mr. Adam—who can not abandon him, and who, as a sort of set-off against his own honor and moderation, is obliged to inhale the spirit of his client — "The church," says Mr. Grindley, "has found this fulcrum in the other world, and it is by playing off that world they enthral the world we

live in." He admits, indeed, that when they employ their authority to enforce the true purposes of religion, they have a right to that awful fulcrum upon which their engine is placed, and then their office will inspire reverence and submission; but when they make use of it for the lowest and most violent purposes, for ends destructive alike to religion and civil society (of course the purposes in question), then it seems it is that disgrace not only falls upon its individuals, but destruction overtakes the order.

My learned friend, by his client's instruction, then immediately applies this general reflection, and says, "that he can discover no other reason why the bishop would no longer permit Mr. Grindley to hold the office, than that he had deviated from his celestial course—had looked to the vile and sordid affairs of the world, and prostituted the sacred dignity of his character to purposes which would degrade men in the lowest situations." My friend said, across the court, that he had never seen the pamphlet. Good God! I believe it. But I have seen it; and I have no doubt that one half of it is copied into his brief; it is written in this very spirit—it brings before the bishop the events of France—it warns him of the fate of his brethren in that country, as an awful lesson to ecclesiastics of all ranks and denominations, and reminds him that 18 archbishops, 118 bishops,

11,850 canons, 3,000 superiors of convents, and a revenue of fifteen millions sterling, were on a sudden swept away. [Mr. Erskine here read an extract from the pamphlet, and then continued:]

Gentlemen, all this is mighty well; but he must be but little acquainted with the calamities of France who believes that this was the source of them. It was from no such causes that those horrors and calamities arose which have disfigured and dishonored her revolution, and which have clouded and obscured the otherwise majestic course of freedom; horrors and calamities which have inspired an alarm in many good men, and furnished a pretext for many wicked ones, in our own country. It was the profligacy and corruption of the French state, and not the immorality of her clergy, which produced that sudden and extraordinary crisis, in the vortex of which the church, and almost religion itself, were swallowed up. The clergy of France was pulled down in the very manner of this pamphlet. A trumpet was blown against their order—the Massacre of St. Bartholomew was acted upon the stage, and the Cardinal of Lorraine introduced upon it, exciting to murder, in the robes of his sacred order. It was asked by a most eloquent writer* (with whom I do not agree in many things, as I do in this), whether this horrid spectacle was introduced to

* Mr. Burke.

inspire the French people with a just horror of blood and persecution; and he answers the question himself by saying, that it was to excite the indignation of the French nation against religion and its officers; and that it had its effect; "that, by such means the archbishop of Paris, a man only known to his flock by his prayers and benedictions, and the extent of whose vast revenues could be best ascertained by his unexampled charity to the unhappy, was to be hunted down like a wild beast, merely because the Cardinal of Lorraine, in the sixteenth century, had been a rebel and a murderer."

In the same manner, this pamphlet, through the medium of abuse upon the bishop of Bangor, is obviously calculated to abuse the minds of the lower orders of the people against the church; and to destroy the best consolation of human life, by bringing the sanctions of religion into doubt and disrepute. I am, myself, no member of the church of England, nor do I know that my friend is—we were both born in another part of the island, and educated in other forms of worship; but we respect the offices of religion, in whatever hands they are placed by the laws of our country; and certainly the English clergy never stood higher than they do to-day, when Mr. Adam, so thoroughly acquainted with the history of his country, as far as it is ancient, and who, from his personal

and professional connections, is so perfectly acquainted with all that passes in the world of our own day, is drawn back to the times of Laud and Wolsey, to search for English prelates who have been a reproach to the order; and when he would represent tyranny and oppression in churchmen, is forced back upon an unreformed church, and to ages of darkness and superstition, because it would have been in vain to look for them under the shadow of that mild religion which has promoted such a spirit of humanity, and stamped such a character upon our country, that if it should ever please God to permit her to be agitated like neighboring nations, the happy difference would be seen between men who reverence religion, and those who set out with destroying it. The bishops, besides (to do them common justice), are certainly the last of the clergy that should be attacked. The indulgent spirit of reformed Christianity, recollecting that, though invested with a divine office, they are men with human passions and affections, permits them to mix in all the customary indulgences, which, without corrupting our morals, constitute much of the comfort and happiness of our lives, yet they in a manner separate themselves from their own families; and, whilst the other orders of the clergy, even the most dignified, enjoy (without being condemned for it), the amusements which taste and refinement spread

before us, no bishop is found within these haunts of dissipation. So far from subjecting themselves to be brought to the assizes for riot and disorder, they thus refuse many of the harmless gratifications, which, perhaps, rather give a grace and ornament to virtue, than disfigure the character of a Christian; and I am sure the reverend prelate whom I represent, has never overstepped those limits which a decorum, perhaps overstrained, has by custom imposed upon the whole order. The bishop's individual character, like every other man's, must be gathered from his life, which, I have always understood, has been eminently useful and virtuous. I know he is connected with those whose lives are both; and who must be suffering distress at this moment from these proceedings. He is nearly allied to one* whose extraordinary knowledge enables him to fulfill the duties of a warm benevolence, in restoring health to the sick, and in bringing back hope and consolation along with it to families in the bitterness of affliction and distress. I have, more than once, received that blessing at his hands, which has added not a little to the anxiety which I now feel.

Gentlemen, I am instructed, and indeed pressed, by the anxiety of the bishop's friends, to call many witnesses to show that he was by no means disturbed with passion, as has been represented, and

* The celebrated Dr. Richard Warren.

That, so far from it, he even repressed those whose zeal for order and whose affection for his person prompted them to interfere, saying to them, "the law will interpose in due season." I have witnesses, to a great number, whom I am pressed to call before you, who would contradict Mr. Grindley in the most material parts of his testimony, but I feel the advantage he would derive from this unnecessary course; he would have an opportunity, from it, to deprive the reverend prelate of the testimony and protection of your approbation. He would say, no doubt, "Oh, I made out the case which vindicated my prosecution, though it was afterwards overturned by the testimony of persons in the bishop's suite and implicitly devoted to his service; I laid facts before the jury from which a conviction must have followed, and I am not responsible for the false glosses by which his witnesses have perverted them." This would be the language of the prosecutor, and I am, therefore, extremely anxious that your verdict should proceed upon the facts as they now stand before the Court, and that you should repel with indignation a charge which is defeated by the very evidence that has been given to support it. I can not, besides, endure the humiliation of fighting with a shadow, and the imprudence of giving importance to what I hold to be nothing, by putting any thing in the scale against it; a conduct which

would amount to a confession that something had been proved which demanded an answer. How far those, from whom my instructions come, may think me warranted in pursuing this course, I do not know, but the decision of that question will not rest with either of us, if your good sense and consciences should, as I am persuaded they will, give an immediate and seasonable sanction to this conclusion of the trial.

Mr. Erskine, after consulting a few minutes with Mr. Plumer, Mr. Leycester, and Mr. Milles, informed the court he should give no evidence. Mr. Justice Heath then summed up as follows :

MR. JUSTICE HEATH.

GENTLEMEN OF THE JURY: This is an indictment against the bishop of Bangor, Hugh Owen, John Roberts, John Williams, and Thomas Jones. The indictment states, "That Samuel Grindley (who, it seems, is the prosecutor of this indictment), on the 8th of January last, was deputy-registrar of the Episcopal and Consistorial Court of the bishop of Bangor, and that, in right of his office, he had the use of a room adjoining to the cathedral church of Bangor, called the registrar's office, for transacting the business of his office; that the defendants, intending to disturb the prosecutor in the execution of his office of deputy-registrar, on the 8th of January last, riotously assembled, and unlawfully broke the registrar's office, and remained there for an hour, and continued making a great disturbance, and assaulted the prosecutor, and stirred up a riot."

This, gentlemen, is the substance of the indictment. The definition of a riot has been truly stated to you—it may be collected, indeed, from the indictment itself—and is, when two or more persons assemble together with an intent mutually to assist each other, and to resist all those who should oppose them, and with a further intent to

break the peace; and it is likewise for a private purpose.

Now, before I sum up the evidence, I shall state those things particularly to which you should direct your attention; and you will consider how the evidence applies in support of the indictment. It must be proved to your satisfaction that the prosecutor is deputy-registrar of this consistorial court of the bishop of Bangor; that, in right of that office, he had the use of this room to transact his business there; that the defendants, intending to disturb him in his office, riotously assembled to disturb the peace, and broke and entered the office-room, and continued there, making a great disturbance, asserting that he had assumed an office which did not belong to him, and making a riot there. These things must be proved to your satisfaction. I will comment upon the evidence as I shall state it to you.

Samuel Grindley, the prosecutor, tells you, that in February, 1792, he was appointed agent to the bishop of Bangor, and that he afterwards held the office of deputy-registrar, under Mr. Gunning, who, it seems, was a minor; that he saw Mr. Gunning, the registrar, in October, 1794; that he paid seventy pounds a year to the bishop, on account of Mr. Gunning, his principal; that the bishop was the person who made the bargain between him and his principal; that he entered on his

office as deputy. He says that he was invited by the bishop, and that the bishop introduced him (the prosecutor) to Mr. Gunning as the principal registrar, and introduced the principal registrar to the witness as his deputy. He says that there was no complaint that he had not discharged the duties of his office; and that he continued to discharge the duties of his office till the 22d of February last. He says that there is an apartment belonging to this office, which, it seems, is under the chapter-house adjoining to the cathedral; that there is a flight of steps going up to it; that he employs his clerks in the office, and he has a resident clerk there. He says he told the bishop that he would resign on the 22d of February last; that on the 4th of January he was absent from Bangor, and returned on the 7th, having received information that his office had been broken open; that the bishop afterwards acknowledged to him, that it had been broken open by his (the bishop's) servants, under his direction. He says that some panes of glass had been taken down, the leads had been removed, and fresh locks had been put upon the doors. All this the bishop acknowledged. And then he gives you an account of his coming there; of his breaking open the door, and his entering again.

Let us consider, so far as this, how it applies. In the first place, it certainly does not lie in the

mouth of the bishop to say that this man was not properly appointed to his office; he was in the exercise of his office; he had made an agreement with his principal, and he paid him seventy pounds a year. The bishop was the person who negotiated the business, and he gave the bishop notice that he meant to give up his office on the 22nd of February; but, you see, between the 4th and 7th of January, before the time the prosecutor had appointed for resigning his office, the bishop thought proper to go to the office and break open the lock; and then, it is contended on the part of the defendants, that the bishop was in peaceable possession. It is contended, too, that, as bishop, he had a jurisdiction in this cathedral; that, because the deputy-registrar must be confirmed by the bishop, the prosecutor is only a tenant at will to the bishop; that he never had a legal appointment, and, therefore, the bishop had a power of dismissing him.

Now, in the first place, supposing it to be proved that the bishop had a power of dismissing him (which does not appear one way or the other), it does not follow from thence that he ought to do it by force or violence—he ought to do it by process of law. It happens in this country that the lord chief justices of the Court of King's Bench and Common Pleas have a right of appointing officers; the judges attending the court at the Old Bailey have a right of appointing the officers

there, and questions have frequently arisen concerning this power of appointment, whether rightfully or wrongfully exercised. What is the mode of deciding it? Each party appoints his officer, and then one brings his action, and it is determined by due course of law. If the bishop had a right of dispossessing this man, which does not appear to me, because, though the appointment of a deputy might not be good without the approbation of the bishop, it does not follow from thence, that the bishop had a right to withdraw that approbation and that confirmation after it was given. Whether he can, or can not, is a question I am not prepared to decide, and it is immaterial to the present question; it is enough to say, that if the bishop had that right and that power, it behooved him to have caused Mr. Gunning to have appointed another deputy, and then that deputy ought to have tried the right. The question then is, was the bishop in peaceable possession? No man is in peaceable possession of any place which he comes to by force and violence. The bishop exercised force and violence in this respect, in breaking the lock, and in putting on a new lock, therefore, the force and violence was on the part of the bishop; he was never in peaceable possession of this place, nor could he have a right to come and put this lock upon the door.

Let us pursue this matter by steps. The prose-

cutor said he came armed with pistols—that was, I think, improper; he ought not to have armed himself with pistols in that fashion. He broke open the lock, and he entered—that was not improper; he being in possession of this office, it was lawful for him to do so. Then, it seems, a Mr. Rasbrook came, who is a person exercising some office under the bishop (his house steward, I think). he came, and the prosecutor presented a pistol to him—that was highly improper. A man has a right to arm himself, and to assemble his friends in defence of his house, but the law allows no more. Because the house is his sanctuary, he is not to arm himself and assemble his friends in defence of his close, but ought to have recourse to legal means, if he is injured; and, therefore, the prosecutor certainly acted with a greater degree of force and violence, in that respect, than he ought to have done. But then that was no legal excuse for the bishop's coming afterwards in the manner he did. The prosecutor's presenting a pistol to Rasbrook could be no inducement to the bishop and the other defendants, because they were not present, and their passions were not provoked by it.

The bishop, in this case, gentlemen, seems to have labored, certainly, under two very great errors. First of all, that he had a right to remove the prosecutor; and, secondly, that he had a right

to remove him by force and violence. Then these persons were removed out of the office; the outer door was secured, by some means, by the prosecutor and the several persons with him. It is said that they were guilty of a riot. I think, certainly, they were guilty of no riot at this time; they were guilty of a misdemeanor in arming themselves, but they stood merely upon the defensive. No person, as I told you before, is justified in arming himself and his servants to defend his close; but if he does arm himself and his servants to defend his close, and opposes no person without the close, then he is guilty of no riot whatever.

The question is, whether or no they are guilty of such a breach of the peace—of an act of so much force and violence—as to constitute a riot. When there was a knocking at the door, the prosecutor said he would shoot any one who should enter; which, I said before, he was not warranted in doing. Being told the bishop was there, he said he would treat him with all possible respect, and he opened the door and admitted him and his followers; and then, he says, he loaded another pistol. He tells you the bishop entered in a great rage. Whether there was any rage or passion, of no, is only material to show whether the rest of the story is probable; because, his being in a rage does not prove him guilty of a breach of the peace. The question is, whether he has committed any

acts in breach of the peace? First of all, the prosecutor tells you that he told the bishop he should behave with proper respect to him, but he should not leave the office. He swears that the bishop took hold of him; and afterwards he went to William Roberts, an husbandman belonging to the witness. He then went to another servant, Robert Davis, and attempted to pull him out; that the bishop returned to William Roberts, collared him, and drew him toward the door; that the bishop went with his hands clenched toward the witness; and the witness describes the manner in which he (the bishop) went toward him. Now his taking hold of the witness is an assault. He says, he attempted to pull him out—his seizing hold of him is an assault; his returning to William Roberts, and collaring him, and pushing him toward the door, is another assault; his going with his hands clenched toward him in a menacing way, if he were near enough to strike him, would be an assault; if not near enough to strike him, it would not be an assault; and then he called to his servants to come and pull him out—that is a breach of the peace, coming and removing them all by force and violence.

Then there is that which passes in respect to Mr. Roberts. The prosecutor and the other witnesses tell you that Roberts was in a great rage—he can not say whether he entered before or after

the orders given by the bishop;—that he clenched his fist, and said, “If nobody will turn him (meaning the prosecutor) out, I will do it.” The bishop said the prosecutor had pistols; upon which Roberts said, in an outrageous manner, “Do not shoot the bishop, shoot me;” and said, that if nobody else would turn the prosecutor out, he would. He asked the prosecutor to go on one side with him, into the churchyard, and said he was not afraid of him in any place. The witness said he had something else to attend to; and another of the witnesses said he promised to meet him at some other time and place. This is, you see, a challenge, by Roberts, to fight the prosecutor—why, that is a breach of the peace. The bishop is present; he is the person who tells Roberts that the prosecutor had pistols; then the bishop hears this challenge. They all came upon one design. When several persons come upon an illegal design or purpose, the act of one, especially if in the presence of all, is the act of all. This, gentlemen, is the sum of the evidence on the one side, and there is no evidence on the other.

The bishop, no doubt, is a man of an excellent character, but at this moment he gave way to his temper. He ought to have followed the process of the law, and not so to have done. Thus much I have said affects the bishop, and affects Roberts. As to Owen, the prosecutor says that Owen came

into the office; he made a noise; he talked very loud. The witness told him, if he had any business, he was there ready to transact it, otherwise he begged they would go about their business. He only speaks to his making a noise. John Williams, he says, was less noisy than the rest. The witness asked what business he had there, and told him to go about his business. He says he stayed there against his will; he stayed after the rest went away.

Upon this it is necessary for me to state, as I did before, that the other defendants coming with the bishop upon the same design, by force and violence to dispossess the prosecutor, undoubtedly they came with an unlawful intent and purpose; and, if you believe these witnesses, they were guilty of the several breaches of the peace which I have stated, in assaulting the prosecutor, in assaulting David Roberts, in assaulting William Roberts, and in the defendant Roberts' challenging the prosecutor. If you believe these witnesses, it seems to me that the defendants are guilty of the riot with which they stand charged. As for the force and violence which the prosecutor made use of, all that may be urged in another place in mitigation of the punishment; it is only for you to determine whether they, or each of them, are guilty of this riot.

Mr. Erskine. The two last witnesses stated a direct contradiction.

Mr. Justice Heath. The law is clear and plain. You will apply the law to the facts as I have stated them. You may banish all prejudices that you may have from all publication. It is, indeed, unnecessary to admonish gentlemen of your enlightened understandings; but, at the same time, considering that individuals are to be tried by the law of the land, if they are guilty, notwithstanding the high character they may deservedly have down to this time, it is your duty to find them guilty. If you have any reasonable doubt whether they are guilty, in that case you will acquit the defendants.

The jury returned, after an absence of five minutes, with a verdict of acquittal as to all the defendants.

THE KING *v.* CUTHELL.

The following speech of Mr. Erskine was delivered in the Court of King's Bench, at Westminster, February 21st, 1799, in defence of John Cuthell, a bookseller in Holborn, indicted for the sale of a seditious libel. The libel in question consisted of a political pamphlet, written by the Rev. Mr. Gilbert Wakefield in reply to a pamphlet published by the bishop of Landaff, in the year 1798. Mr. Wakefield's pamphlet was not printed by Mr. Cuthell, but copies of it were, by the author's direction, sent to his shop for sale, he having previously been the seller of all Mr. Wakefield's works, which were, without exception, books of a classical, and not of a political, nature. Without suspicion of its nature, and with no examination of its contents, Mr. Cuthell began the sale of the work; but upon learning that it was of a political, and, possibly, of a seditious character, its sale was at once discontinued.

The principle contended for by Mr. Erskine was, that if a negligent publication of libelous matter be an indictable offence, then, in conformity with the general principles of pleading, such negligence should be charged by a special count. In other words, upon an indictment charging a publication with a treasonable, seditious, or malignant intention, if the evidence should establish the defendant's innocence of the nature of the publication, and the entire absence of any malicious intention, the jury should find a special verdict as to defendant's negligence, and thus negative the motives alleged in the indictment.

Mr. Erskine's position may, perhaps, be best stated in his own language, as follows: "But the doctrine which I shall ever oppose, as destructive of every human security, and repugnant to the first elements of criminal justice, is this, that though the defendant, taking upon himself the difficult, and frequently impossible, proof of accident or oversight, should be able to convince the jury that he never saw the matter

charged to be a libel ; that it was imposed upon him as a work of a different quality, or that he was absent when a servant sold it, and to which servant he had not given a general license to sell every thing which was brought to him, and who, moreover, could fortify the proof of his innocence by his general deportment and character ; yet that such a publisher must nevertheless be found guilty as a malignant publisher, by virtue of an abstract legal proposition. This I deny, and have throughout my whole professional life uniformly denied.

* * * I will meet my learned friend, the Attorney-General, in the lord's House of Parliament on that question, if you, the jury, will assist me with the fact to raise it by a special verdict, 'That the book,' if you please, 'was a libel ; that Mr. Cuthell, the defendant, published it, but that he published it from negligence and inadvertency, without the motives charged by the indictment.' If you, gentlemen of the jury, will find such a verdict, I will consent never to re-enter Westminster Hall again, if one judge out of twelve will, upon a writ of error, pronounce judgment for the Crown."

SPEECH OF MR. ERSKINE

IN DEFENCE OF

JOHN CUTHELL.

February 21st, 1799.

I rise to address you, gentlemen of the jury, with as much anxiety as I have ever felt in the course of my professional life. The duty I have to perform is difficult and delicate. I am counsel for Mr. Cuthell only, who is charged merely as publisher of a writing for which the reverend gentlemen now in court (and who is to plead his own cause) is immediately to be tried, on another indictment, as the author. The rules of law would entitle Mr. Cuthell to a double defence. He might maintain the innocence of the book, because his crime as publisher can have no existence unless the matter be criminal which he has published; and, supposing it to be criminal, he might separate himself, by evidence, from the criminal purpose charged upon him by the record. The first of these offices he must not be supposed to shrink from because of its difficulty, or from the force of the verdicts which the Attorney-General

has adverted to as having been given in the city of London. Mr. Johnson, who was there convicted, stood in the ordinary situation of a bookseller selling a book in the course of his trade. On that occasion I thought myself bound to make the defence of the book; but the defence of a book may be one thing, and that of its publisher another. There can be no proceedings *in rem* by an Attorney-General against a book, as against tea or brandy in the Exchequer. The intention of the author, and of each publisher, involves another consideration, and it is impossible to pronounce what opinion the jury of London might have held concerning the book, if its author had been to lay before them his own motives, and the circumstances under which it was written. Even after Mr. Cuthell shall be convicted from my failing in his defence (a supposition I only put, as the wisest tribunals are fallible in their judgments), the verdict ought not in the remotest degree to affect the reverend gentleman who is afterwards to defend himself. His motives and intentions will be an entirely new cause, to be judged of as if no trial had ever been had upon the subject; and so far from being prejudiced by other decisions, I think that, for many reasons, he will be entitled to the most impartial and the most indulgent attention. These considerations have determined me upon the course I shall pursue. As Mr. Cuthell's exculpa-

tion is by disconnecting himself wholly from the work, as a criminal publisher, from his total ignorance of its contents, and, indeed, almost of its existence, I shall leave the province of its defence to Mr. Wakefield himself, who can best explain to his own jury the genuine sentiments which produced it, and whose very deportment and manner in pleading his own cause may strikingly enforce upon their consciences and understanding the truth and integrity of his defence. Observations from me might only coldly anticipate, and perhaps clash with the arguments which the author has a just, natural, and a most interesting right to insist upon for himself.

There is another consideration which further induces me to pursue this course. The cause, so conducted, will involve a most important question as it regards the liberty of the press; because, though the principles of criminal and civil justice are distinguished by as clear a boundary as that which separates the hemispheres of light and darkness, and though they are carried into daily practice throughout the whole circle of the law; yet they have been too long confounded and blended together when a libel is the crime to be judged. This confusion, gentlemen, has not proceeded from any difficulty which has involved the subject, because of all the parts of our complicated system of law it is the simplest and clearest; but because po-

litical judges, following one another in close order, and endeavoring to abridge the rights and privileges of juries, have perverted and distorted the clearest maxims of universal jurisprudence, and the most uniform precedents of English law. Nothing can establish this so decisively as the concurrence with which all judges have agreed in the principles of civil actions for libels or slander, concerning which there never has been a controversy, nor is there to be found throughout the numerous reports of our courts of justice a discordant case on the subject; but in indictments for libels, or more properly in indictments for political libels, the confusion began and ended.

In the case of a civil action throughout the whole range of civil injuries, the master always is *civiliter* answerable for the act of his servant or agent, and accident or neglect can therefore be no answer to a plaintiff complaining of a consequential wrong. If the driver of a public carriage maliciously overturns another upon the road, whilst the proprietor is asleep in his bed at a hundred miles distance, the party injuring must unquestionably pay the damages to a farthing; but though such malicious servant might also be indicted, and suffer an infamous judgment, could the master also become the object of such a prosecution? Certainly not. In the same manner partners in trade are civilly answerable for bills drawn by

one another, or by their agents drawing them by procuration, though fraudulently, and in abuse of their trusts; but if one partner commits a fraud by forgery or fictitious indorsements, so as to subject himself to death or other punishment, by indictment, could the other partners be indicted? To answer such a question here would be folly; because it not only answers itself in the negative, but exposes to scorn every argument which would confound indictments with civil actions. Why, then, is printing and publishing to be an exception to every other human act? Why is a man to be answerable *criminaliter* for the crime of his servant in this instance more than in all other cases? Why is a man who happens to have published a libel under circumstances of mere accident, or, if you will, from actual carelessness or negligence, but without criminal purpose, to be subjected to an infamous punishment and harangued from a British bench as if he were the malignant author of that which it was confessed before the court delivering the sentence, that he had never seen nor heard of. As far, indeed, as damages go, the principle is intelligible and universal; but as it establishes a crime and inflicts a punishment which affects character and imposes disgrace, it is shocking to humanity and insulting to common sense. The Court of King's Bench, since I have been at the bar (very long, I admit, before the noble lord

presided in it, but under the administration of a truly great judge), pronounced the infamous judgment of the pillory on a most respectable proprietor of a newspaper for a libel on the Russian ambassador, copied, too, out of another paper, but which I myself showed to the court by the affidavit of his physician, appeared in the first as well as in the second paper whilst the defendant was on his sick bed in the country, delirious in a fever. I believe that affidavit is still on the files of the court. I have thought of it often—I have dreamed of it and started from my sleep—sunk back to sleep, and started from it again. The painful recollection of it I shall die with. How is this vindicated? From the supposed necessity of the case. An indictment for a libel is, therefore, considered to be an anomaly in the law. It was held so undoubtedly; but the exposition of that error lies before me—the libel act lies before me, which, expressly and in terms, directs that the trial of a libel shall be conducted like every other trial for any other crime, and that the jury shall decide, not upon the mere fact of printing or publishing, but upon the whole matter put in issue, i. e., the publication of the libel with the intentions charged by the indictment. This is the rule by the libel act, and you, the jury, as well as the court, are bound by it. What, then, does the present indictment charge? Does it charge that merely Mr. Cuthell published,

or negligently published, the reply to the bishop of Landaff? No. It charges "that the defendant, being a wicked and seditious person, and malignantly and traitorously intending to secure the invasion of Great Britain by the French, and to induce the people not to defend the country, had published," etc., setting forth the book. This is the charge, and you must believe the whole complex proposition before the defendant can be legally convicted. No man can stand up to deny this in the teeth of the libel act, which reduces the question wholly to the intention, which ought to be a foundation for their verdict. Is your belief of negligence sufficient to condemn Mr. Cuthell upon this indictment, though you may discredit the criminal motive which is averred? The best way of trying that question is to find the negligence by a special verdict, and negative the motives as alleged by the indictment; do that, and I am satisfied.

I am not contending that it may not be wise that the law should punish printers and publishers even by way of indictment, for gross negligence (*crassa negligentia*), because of the great danger of adopting a contrary rule. Let it, for argument's sake, be taken that such an indictment may, even as the law stands, be properly maintained; but, if this be so, why should not the indictment, in conformity with the universal rules of pleading,

charge such negligence by a distinct count? Upon what principle is a man, who is guilty of one crime, to be convicted, without a shadow of evidence, or in the teeth of all evidence, of another crime, greatly more heinous, and totally different.

If upon a count charging a negligent publication a publisher were convicted, he could only appear upon the record to be guilty from negligence; but, according to the present practice, the judge tells the jury, that though a defendant has only been negligent, he is guilty upon the whole record, which charges a treasonable, seditious, or malignant intention; and after such a conviction, when he appears in court to receive judgment, and reminds the judge, who inveighs against his traitorous, seditious, or malignant conduct, that the evidence established his negligence only, he is instantly silenced, and told that he is estopped by the record, which charges a publication with these mischievous intentions, and of which entire charge the jury have found him guilty. I appeal, boldly, to the truly excellent and learned chief justice, whether this be conformable to the precision of the English law in any of its other branches, or to the justice of any law throughout the world.

But it has been said, and truly, how is the intention to be proved but by the act? I, of course, admit that the intentions of men are inferences of reason from their actions, where the action can

flow but from one motive, and be the reasonable result but of one intention. Proof of such an action is undoubtedly most convincing proof of the only intention which could produce it; but there are few such actions; nor, indeed, scarcely any human conduct which may not, by circumstances, be qualified from its original *prima facie* character or appearance. This qualification is the foundation of all defence against imputed crimes. A mortal wound, or blow, without adequate provocation visible to a grand jury, is a just foundation for an indictment of murder; but the accused may repel that inference, and reduce the crime from murder to manslaughter, or to excusable, and even to justifiable, homicide. Mr. Cuthell asks no more. He admits that on the evidence now before you he ought to be convicted, if the book is in your judgment a libel; because he stands before you as a publisher, and may be, therefore, taken to have been secretly connected with the author, or even to be the author himself. But he claims the right of repelling those presumptions by proof; and the only difference between the Crown and me will be, not as to the existence of the fact on which I rest my defence, but whether the proof may be received as relevant, and be acted upon, if believed by you, the jury. I am sorry to say, gentlemen, that it is now become a commonplace position, that printers and booksellers are answerable for

simple negligence; yet no judge, in my hearing, has ever stated that naked proposition from the bench. It has been imputed as the doctrine of the noble and learned judge—when and where he delivered it I am ignorant—he has, on the contrary, tried indictments on the principles of the libel bill, before the libel bill existed; and on these principles Stockdale was tried before him, and acquitted. Where a printer, indeed, has printed, or a bookseller has sold, a book, written by an unknown or unproduced author, and can not bring any evidence in his defence, he must, to be sure, in common sense, and upon every principle of law, be criminally responsible, if the thing published be a libel; but not for negligence only, but as criminal in the full extent of the indictment.

A publisher, indeed, though separated in original intention from the criminal motives of the author, may be found to be responsible in law for the publication, upon the legal presumption that he had adopted the criminal sentiments of the author, and criminally circulated them by printing or publication. But such a conviction does by no means establish the proposition, that innocent printers or publishers, where they can show their innocence, are criminally responsible for negligence only. On the contrary, it proceeds upon the criminality being *prima facie* established by the act of publishing in cases where the printer or pub-

lisher can not show the negligence or accident which had led to the publication ; but where such mere negligence or accident can be established to the satisfaction of a jury, which not very often can be the case, the criminal inference is then repelled, and the defendant ought to be entitled to an acquittal. The numerous convictions, therefore, of publishers upon the mere act of publication, establish no such proposition as that which the Attorney-General has contended for ; because such publishers were convicted of the criminal intentions charged in the indictment, not upon the principle of criminal responsibility for an act of neglect only, but because it could not be established, in these cases, that the act of publishing arose from negligence only. By the act of publishing matter from whence a criminal intention results, as an inference of reason, and, therefore, as an inference of law, the criminal mind is *prima facie* fairly imputable ; and in the absence, therefore, of satisfactory evidence on the part of the defendant to repel the criminal conclusion, the guilt is duly established ; but then, this is not doctrine applicable singly to libels—it applies equally to all crimes where the most innocent man may be convicted, if, from unfortunate circumstances, he can not repel the presumptions arising from criminating proof. But the doctrine which I shall ever oppose, as destructive of every human security, and repugnant to the

first elements of criminal justice, is this, that though the defendant, taking upon himself the difficult, and frequently impossible, proof of accident or oversight, should be able to convince the jury that he never saw the matter charged to be a libel—that it was imposed upon him as a work of a different quality—or, that he was absent when a servant sold it, and to which servant he had not given a general license to sell everything which was brought to him—and who, moreover, could fortify the proof of his innocence by his general deportment and character; yet, that such a publisher must nevertheless be found guilty as a malignant publisher, by virtue of an abstract legal proposition, this I deny, and have, throughout my whole professional life, uniformly denied. It never has been adjudged in such a shape as to be fairly grappled with. I positively deny such a doctrine, and I am sure that no judge ever risked his character with the public by delivering it as law from the bench. The judges may have been bound at *Nisi Prius*, as I admit they are, to decide according to the current of decisions. I will meet my learned friend, the Attorney-General, in the lord's house of Parliament on that question, if you, the jury, will assist me with the fact to raise it by finding as a special verdict, "that the book," if you please, "was a libel; that Mr. Cuthell, the defendant, published it; but that he published it from

negligence and inadvertency, without the motives charged by the indictment." If you, gentlemen of the jury, will find such a verdict, I will consent never to enter Westminster Hall again, if one judge out of twelve will, upon a writ of error, pronounce judgment for the Crown. The thing is impossible, and the Libel Act was made for no other purpose than to suppress doctrines which had long been branded as pernicious and destructive to public freedom and security. The Libel Bill was passed to prevent trials of libels from being treated as an anomaly in the law, and to put them on a footing with all other crimes; and no crime can possibly exist when the intention which constitutes its essence can be separated from the act. "*Actus non facit reum, nisi mens sit rea.*" If a man, without knowing the King, were to give him a blow, which might even endanger his life, could he be convicted of compassing and imagining the death of the King under the statute of Edward III.? Undoubtedly not; because the compassing or intention was the crime, and the blow was only the overt act from whence the compassing was to be a legal inference, unless the prisoner repelled it by showing the circumstances of the accident and ignorance under which he assaulted the King. I, of course, admit that it is not necessary to prove that a publisher had seen the book he published; for if he authorizes his servants to publish every thing with-

out examination, it would be sufficient proof, in the judgment of a jury, according to circumstances, that he was the willful and criminal publisher or author himself, or secretly connected with the author, and criminally implicated in his guilt. But the present question is, whether, if he can convince you, the jury, of his innocence, you are still bound to convict him under an imperative rule of law, though you believe his mind to have been unconscious of the crime imputed by the indictment.

If a man were to go upon the roof of a house in the Strand or Fleet street, and throw down large stones upon the passengers below, it would undoubtedly be murder, though a stranger only were killed, against whom no particular malice could possibly be suspected; i. e., it would be murder if the facts were returned to the judges by special verdict. But would a jury be bound to convict him, even though they were convinced by the clearest evidence that he had mistaken the side of the house, and from inadvertence had thrown the stones into the street, instead of on the other side, which led to an unfrequented spot? This proof might be difficult; but if the proof existed, and the jury believed it, would it be murder? Common law, common sense, and common humanity, revolt alike at the idea.

The Attorney-General has admitted the true

principle of the liberty of the press, as it regards the quality of a publication. He has admitted it, greatly to his honor, because he is the first Attorney-General who ever, to my knowledge, has so distinctly admitted it. He has, indeed, admitted the true principle in the very way I have always understood it in most of the criminal prosecutions which, in my time, have been the subject of trial. The questions have always arisen on the application of the principle to particular cases, and that is the sole question to-day. He has admitted that every subject has a clear right freely to discuss the principles and the forms of the government, to argue upon their imperfections, and to propose remedies; to arraign, with decency and fair argument, the responsible ministers and magistrates of the country, though not to hold them up to general, indiscriminating execration and contempt. And he has admitted also, that it is the office of the jury to say within which of the two descriptions any political writing was to be classed. This admission comes strongly in support of publishers. For if an author could not write legally upon any such subjects, publishers ought then to reject the book altogether upon the very view of the subject as collected from the title-page, without adverting to the contents. But if writings respecting our government and its due administration be unquestionably legal, a general bookseller

has no such reserve imposed upon him from the general subject of the work, and must read his whole library in a perpetual state of imprisonment in his shop, to guard him from perpetual imprisonment in a gaol. If he published, for instance, the *Encyclopædia* of Paris or London, and in the examination of all science and of all art in such a stupendous work there should be found, even in a single page or paragraph, a gross attack on religion, on morals, or on government, he must be presumed to be malignantly guilty, and (according to the argument) not *prima facie* merely, but conclusively, to be the criminal promulgator of mischief, with mischievous intentions. Surely this can never be even stated in a court of justice. To talk of arguing it, is ridiculous. Such a person might, indeed, be *prima facie* liable, and I admit that he is so; but surely a court and jury are invested with the jurisdiction of considering all the circumstances, and have the right of judging according to the just and rational inferences arising from the whole case whether he was intentionally mischievous. This is all I contend for Mr. Cuthell; and it is a principle I never will abandon—it is a principle which does not require the support of the libel act, because it never has at any time been denied. When Lord Mansfield directed the jury to convict Mr. Almon as the criminal publisher of Junius, he told them that if

Junius was a libel, the guilt of publishing was an inference of law from the fact of publication, if a defendant called no witness to repel it, and that no witnesses had been examined by Mr. Almon. But he admitted, in express and positive words, as reported by Sir James Burrow, in the fifth volume of his reports, "That the publication of a libel might, by circumstances, be justified as legal, or excused as innocent, by circumstances to be established by the defendant's proof." But according to the arguments of to-day no such defence is admissible. I admit, indeed, that it is rarely within the power of a printer or publisher to make out such a case by adequate evidence, insomuch, that I have never yet been able to bring before a jury such a case as I have for Mr. Cuthell; but the rareness of the application renders it more unjust to distort the principle by the rejection of it when it justly applies.

Having now laid down the only principle upon which Mr. Cuthell can be defended, if the passages in the book selected by the indictment are libellous, I will now bring before you Mr. Cuthell's situation, the course of his trade and business, and his connection, if it can be called one, with the work in question.

Mr. Cuthell, gentlemen, is not at all in the situation of many equally respectable booksellers; the course of whose trade, at the other quarters

of the town, in the transitory publications of the day on all subjects, exposes them to the hourly risk of prosecutions on the most solid principles of law without almost the possibility of such a defence as Mr. Cuthell has to lay before you. They who wish to mix in the slander, the fashion, and the politics of the day, resort for newspapers and pamphlets to those gay repositories, filled with the active, bustling, and ambitious men of the world. In those places nothing is read or talked of but what is happening at the very moment; a day generally consigning to oblivion domestic events, however singular or afflicting; even the revolutions of empires giving place in a week to newer topics, even to the favored pantomime of the day. The bookseller who stands behind such a counter, collecting and exposing to view whatever may be thrown upon it, without perusal or examination, who can have no other possible reason for supposing that he sells no libels except the absurd supposition that no libels are written, such a man is undoubtedly *prima facie* criminally responsible—a responsibility very rarely to be successfully repelled. Sale of a libel by the master of such a shop, however pure in his morals, without the most demonstrative evidence on his part to repel the presumption arising from the act, is unquestionably evidence of publishing the book, in the criminal acceptance of publication, because, in

the absence of such evidence, he is justly taken to be the author himself, or acting in concert with him in giving currency and circulation to his work. I pray you, gentlemen, to recollect that neither now, nor at any former period, have I ever disputed a proposition built upon reason, and matured by decisions into law. But Mr. Cuthell's shop is of a directly opposite description, and gives support to the evidence by which I mean to repel the criminal presumption arising, *prima facie*, from the act of publication.

He resides in a gloomy avenue of Holborn. No colored lamps or transparent shop-glasses dazzle the eye of vagrant curiosity, as in the places I have alluded to. As in the shops of fashion nothing scarcely is sold which the sun has gone down upon, so in his house nothing almost is to be seen that is not sacred to learning and consecrated by time. There is not a greater difference between Lapland and Paris, than between the shops I have adverted to and that of Mr. Cuthell. There you find the hunter after old editions; the scholar who is engaged in some controversy, not concerning modern nations, but people and tongues which have for centuries passed away, and which continue to live only in the memory of the antiquary. While crowds in the circles of gayety or commerce are engaged at other libraries in the bitterness of political controversy, the pale student sits soberly dis-

passing at Mr. Cuthell's the points of the Hebrews, or the accents of the Greeks. Mr. Cuthell, gentlemen, takes no personal merit from this distinction from other booksellers. It is not from superior taste or virtue, or from prudent caution, that he pursues this course, but because he finds his profit in adhering to a particular and well-known branch of bookselling, as every man will always find the surest profit in sticking to his own line of business. We lawyers find our profit, for the very same reason, in practising in one court instead of scouring Westminster Hall; because men are supposed, by their steadiness to one object, to know what they are about.

When I shall have made out this situation of Mr. Cuthell, and have shown his only connection with the work in question from his literary connection with its learned author, I shall have made out a case which will clearly amount to a legal defence as an innocent publisher. I proceed to this defence with the greatest satisfaction, as it is not only without possible injury to the defendant, but in every possible event must contribute to his safety. If I succeed, I am at no man's mercy; if I fail, even the very unsuccessful approach to a legal justification will present a case for mitigation which the candor and justice of my learned friend will undoubtedly respect.

Mr. Cuthell had been applied to by Mr.

Wakefield, near a year before this little sudden performance had an existence, to sell all his works which had been sold before by a most respectable bookseller who had just retired from trade. It is but justice at once to Mr. Wakefield and to Mr. Cuthell to say, that the works of the former, which were numerous, were exemplary for their piety and learning, and that the character of the author fully corresponded with the inferences to be collected from his publications. He was a most retired and domesticated scholar, marked and distinguished by a warm and glowing zeal for the Christian religion, and what removed him from every possible suspicion in the mind of Mr. Cuthell, or of any man living, as being engaged in schemes for the introduction of anarchy and irreligion, his most recent publications which had been committed to Mr. Cuthell for sale were his answers to Mr. Paine's attack upon the doctrines of Christianity, which Mr. Wakefield had not merely refuted by argument, but stigmatized in terms of the justest indignation. This scorn and resentment at the works I have alluded to, was surely a full earnest of opinions which characterized a friend to religion, to harmony, peace, and goodwill to men; and Mr. Cuthell knew at the same time when the selling of this reply to the bishop of Landaff was first proposed to him, that Mr. Wakefield had before written to him on the subjects

of religious controversy, and that that excellent prelate held his general character in respect. There is nothing, therefore, upon earth which amounts even to incaution in the little which follows to complete the statement of his case.

Mr. Wakefield having printed the pamphlet by Mr. Hamilton, his own printer, without the smallest previous communication with Mr. Cuthell, he brought him the form of the advertisement, when it was ready for sale, and desired him to send it for insertion in the newspapers marked in the margin of it; and at the same time desired Hamilton, his printer, to send the books already printed to his shop. This was over-night on the 31st of January. Some of the books were accordingly sent over-night and the rest next day.

The advertisements having appeared in the morning papers, Mr. Cuthell was, of course, applied to for them by booksellers and others, and sold them accordingly, not because he sold every thing—much less works on political subjects, and, least of all, by unknown authors—but because his mind was fully prepossessed that the work he was selling was an added publication to the long catalogue of Mr. Wakefield's other writings, the character of all which for learning and morals had been universally acknowledged, and whose character for both had ever been undisputed. The book having become offensive, Mr. Cuthell

was put in process by the Crown, and the service of it on his person was the first intimation or suspicion he had that the book was different from the many others which he had long been in the course of selling without offence or question. It is scarce necessary to add that he then discontinued the sale and sent back the copies to the author.

This, gentlemen, is the case as it will be established by proof. I shall not recapitulate the principle of the defence, which you are already in possession of, much less the application of the evidence to the principle, which appears to me to be self-evident if the principle can be supported; and if it be denied or disputed I only desire to remark that no person in my station, who has ever made a point desiring the law to be reserved to him, has ever been refused by the noble and learned judge: I mean the right of having the facts found by special verdict, that the law may be settled by the ultimate jurisdiction of the country; because judges at *Nisi Prius* must follow the current of authorities, however erroneous the sources of them may be. If you, the jury, therefore, shall from the evidence believe that Mr. Cuthell was innocent in intention, you may find the publication and negative the intention charged by the record; by doing which, if the defendant be legally guilty, the Crown, notwithstanding that negative, will be

entitled to judgment; whereas, if you find a general verdict of guilty, the term guilty, in the general finding, will comprehend your opinion of the criminal intention charged, though it was not your intention to find it; and Mr. Cuthell will not be allowed to controvert that finding as a fact, although you, the jury, actually rejected it—his guilt being part of your verdict and conclusive of the intention which you disbelieved.

With regard to the book itself, though I leave its defence to its eminently learned author, yet there are some passages which I can not help noticing. [Here Lord Erskine commented upon several of them, and then concluded as follows:] I was particularly struck, indeed, that the following passage should have made any part of the indictment: “We, sons of peace, see, or think we see, a gleam of glory through the mist which now envelops our horizon. Great revolutions are accomplishing; a general fermentation is working for the purpose of general refinement through the universe.”

It does not follow from this opinion or prepossession of the author, that he therefore looks to the consummation of revolutions in the misery or destruction of his own country; the sentiment is the very reverse; it is, that amidst this continued scene of horror which confounds and overwhelms the human imagination, he reposes a pious confi-

dence, that events, which appear evil on the surface, are, in the contemplation of the wise and benevolent Author of all things, leading on in their consequences to good, the prospect of which Mr. Wakefield considers "as a gleam of glory through the mist which now envelops our horizon." I confess, for one, that, amidst all the crimes and horrors which I certainly feel mankind have to commiserate at this moment, perhaps beyond the example of any former period, crimes and horrors which, I trust, my humanity revolts at as much as any other man's, I see nothing to fear for our country or its government, not only from what I anticipate as their future consequences, but from what they have produced already; I see nothing to fear for England from the destruction of the monarchy and priesthood of France; and I see much to be thankful for in the destruction of papal tyranny and superstition. There has been a dreadful scene of misfortune and of crime, but good has, through all times, been brought out of evil. I think I see something that is rapidly advancing the world to a higher state of civilization and happiness, by the destruction of systems which retarded both; the means have been, and will be, terrible; but they have been, and will continue to be, in the hand of God. I think I see the awful arm of Providence, not stopping short here, but stretched out to the destruction of the Mahometan

Tyranny and superstition also. I think I see the freedom of the whole world maturing through it: and so far from the evils anticipated by many men, acting for the best, but groping in the dark, and running against one another, I think I see future peace and happiness arising out of the disorder and confusion that now exists, as the sun emerges from the clouds; nor can I possibly conceive how all this ruin, falling upon tyrannous and blasphemous establishments, has the remotest bearing against the noble and enlightened system of our beloved country. On the contrary, she has been the day-star of the world, purifying herself from age to age, as the earliest light of heaven shone in upon her; and spreading, with her triumphant sails, the influence of a reformed religion, and a well-balanced liberty throughout the world. If England, then, is only true to the principles of her own excellent constitution, the revolt of other nations against their own systems can not disturb her government. But what, after all, is my opinion, or the judgment of the court, or the collective judgment of all human beings upon the scenes now before us? We are like a swarm of ants upon an ant-hill, looking only at the surface we stand on; yet affecting to dispose of the universe, and to prescribe its course, when we can not see an inch beyond the little compass of our transient existence. I can not, therefore, bring myself to com-

prehend how the author's opinion, that Providence will bring, in the end, all the evils which afflict surrounding nations, to a happy and glorious consummation, can be tortured into a wish to subvert the government of his country.

The Attorney-General has admitted—I notice it to his honor, because all Attorney-Generals have not been so manly and liberal—the Attorney-General has admitted that he can not seek in this land of liberty to deny the right of every subject to discuss with freedom the principles of our constitution—to examine its component parts, and to reason upon its imperfections, if, in his opinion, imperfections are to be found in it. Now this just admission can not be qualified by a harsh and rigorous scrutiny into the language employed in the exercise of this high and useful privilege. It never can be said that you may tickle corruption with a straw, but that you must not shake it at its root. The true criterion, therefore, comes round again, at last, to the mind and intention, which, by taking the whole work together and the character of its author into consideration, it is your office to determine; and the concluding sentence of this publication, in which Mr. Wakefield must candidly be supposed to have summed up the purpose and application of his work, is quite decisive of its spirit and purpose, viz., that instead of looking to new sources of taxation to support

the continuance of war, the safety of our country would better be consulted in making an effort toward peace; which, if defeated by the fraud or ambition of our enemy, would unite every heart and hand in our defence. Hear his own concluding words: "Restore the spirit of your constitution, correct your abuses, and calm your temper; then, (and surely they who have been successful in their predictions through all this conflict have more reason to expect attention to their opinions, than those who have been invariably wrong,) then, I say, solicit peace; and, take my word for it, the French republic, so far from insisting on any concessions of humiliation and disgrace, will come forward to embrace you—will eagerly accept your friendship, and be proud of a connection with the first people in the universe. Should I be mistaken in this event, and have formed a wrong judgment of their temper and designs, still the good effect of this advice will be an inestimable acquisition—a vigorous and generous unanimity among ourselves."

In the defence I have made there are but few passages I have noticed; respecting those I am entitled to the protection of your candor; but you are not to conclude that the others are indefensible because I do not defend them—the defence of the book (as I before observed to you) being placed in other hands more fit to manage it, and it

would have been out of my province, in Mr. Cuthell's case, to have entered more at large into the subject.

The jury found the defendant guilty, and he was sentenced to pay a fine of thirty marks, upon payment of which he was discharged.

MR. ERSKINE'S SPEECH

IN DEFENCE OF JAMES HADFIELD.

Mr. Erskine's celebrated defence of James Hadfield, for high treason in compassing the death of the King, was his last appearance in any court in defending a party prosecuted by the Crown. The accused, an invalid soldier in the British army, was indicted for firing a pistol at the King in the Drury Lane theatre. The defence rested entirely upon the ground of the prisoner's insanity. Mr. Erskine having, in an admirable manner, presented the doctrine of insanity as applicable to cases of a criminal nature, proceeded to show that the prisoner had been severely wounded in battle by a sword-cut, which laid open his head to the brain, and that after receiving this wound he was liable to frequent fits of insanity, which had caused his confinement for protection. He further urged, that a short time previous to committing the offence he had become possessed with the notion that his immediate death by violence would produce some great benefit to the human race, and that he therefore determined to shoot the King, and thus secure his conviction and execution for high treason.

Notwithstanding the strong case made out by the Crown, and the natural feeling of horror upon the part of judges and jurors at an attempt upon the life of their Sovereign, Mr. Erskine's clear and logical presentation of the theory of the defence, and of the facts in support of that theory, almost of itself sufficed to secure an acquittal. And Lord Kenyon, who, during the course of the evidence for the Crown, had appeared much against the prisoner, after the examination of a few witnesses for the defence, delivered his opinion to the

Attorney-General, as the opinion of the court, that the trial should not be further proceeded with, since in the opinion of his lordship and the court, a clear case of insanity was established as existing at the very moment of firing the pistol. An act of Parliament having passed, 40 Geo., 3, c. 94, for the detention, during the pleasure of the Crown, of persons acquitted of treason or felony on the ground of insanity, Hadfield was for many years confined in Bedlam. He is said to have survived the King whose life he attempted, and all the judges, jurymen, and counsel engaged in the trial, though he was never afterwards free from attacks of mental hallucination.

Of Mr. Erskine's famous argument in this case it has been well remarked, that "It is now, and ever will be, studied by medical men for its philosophic views of mental diseases—by lawyers for its admirable distinctions as to the degree of alienation of mind which will exempt from penal responsibility—by logicians for its severe and connected reasoning—and by all lovers of genuine eloquence for its touching appeals to human feeling."

SPEECH OF MR. ERSKINE.

GENTLEMEN OF THE JURY: The scene which we are engaged in, and the duty which I am not merely privileged, but appointed by the authority of the court, to perform, exhibits to the whole civilized world a perpetual monument of our national justice.

The transaction, indeed, in every part of it, as it stands recorded in the evidence already before us, places our country and its government and its inhabitants upon the highest pinnacle of human elevation. It appears that upon the 15th of May last, His Majesty, after a reign of forty years, not merely in sovereign power, but spontaneously in the very hearts of his people, was openly shot at (or to all appearance shot at) in a public theatre in the centre of his capital, and amidst the loyal plaudits of his subjects, yet not a hair of the head of the supposed assassin was touched. In this unparalleled scene of calm forbearance, the King himself, though he stood first in personal interest and feeling as well as in command, was a singular and fortunate example. The least appearance of emotion on the part of that august personage, must unavoidably have produced a scene quite different, and far less honorable than the court is

now witnessing; but His Majesty remained unmoved, and the person apparently offending was only secured, without injury or reproach, for the business of this day.

Gentlemen, I agree with the Attorney-General (indeed, there can be no possible doubt), that if the same pistol had been maliciously fired by the prisoner, in the same theatre, at the meanest man within its walls, he would have been brought to immediate trial, and, if guilty, to immediate execution. He would have heard the charge against him for the first time when the indictment was read upon his arraignment. He would have been a stranger to the names and even to the existence of those who were to sit in judgment upon him, and of those who were to be the witnesses against him; but upon the charge of even this murderous attack upon the King himself, he is covered all over with the armor of the law. He has been provided with counsel by the King's own judges, and not of their choice, but of his own. He has had a copy of the indictment ten days before this trial. He has had the names, descriptions and abodes of all the jurors returned to the court; and the highest privilege of peremptory challenges derived from and safely directed by that indulgence. He has had the same description of every witness who could be received to accuse him; and there must at this hour be twice the testimony against him as

would be legally competent to establish his guilt on a similar prosecution by the meanest and most helpless of mankind.

Gentlemen, when this melancholy catastrophe happened, and the prisoner was arraigned for trial, I remember to have said to some now present, that it was, at first view, difficult to bring those indulgent exceptions to the general rules of trial within the principle which dictated them to our humane ancestors in cases of treasons against the political government, or of rebellious conspiracy against the person of the King. In these cases, the passions and interests of great bodies of powerful men being engaged and agitated, a counterpoise became necessary to give composure and impartiality to criminal tribunals; but a mere murderous attack upon the King's person, not at all connected with his political character, seemed a case to be ranged and dealt with like a similar attack upon any private man.

But the wisdom of the law is greater than any man's wisdom; how much more, therefore, than mine! An attack upon the King is considered to be parricide against the state, and the jury and the witnesses, and even the judges, are the children. It is fit, on that account, that there should be a solemn pause before we rush to judgment; and what can be a more sublime spectacle of justice than to see a statutable disqualification of a

whole nation for a limited period—a fifteen days' quarantine before trial—lest the mind should be subject to the contagion of partial affections!*

From a prisoner so protected by the benevolence of our institutions, the utmost good faith would, on his part, be due to the public if he had consciousness and reason to reflect upon the obligation. The duty, therefore, devolves on me, and, upon my honor, it shall be fulfilled. I will employ no artifices of speech. I claim only the strictest protection of the law for the unhappy man before you. I should, indeed, be ashamed if I were to say anything of the rule in the abstract by which he is to be judged, which I did not honestly feel; and I am sorry, therefore, that the subject is so difficult to handle with brevity and precision. Indeed, if it could be brought to a clear and simple criterion, which could admit of a dry admission or contradiction, there might be very little difference, perhaps none at all, between the Attorney-General and myself, upon the principles which ought to govern your verdict; but this is not possible, and I am, therefore, under the necessity of submitting to you and to the judges for their direction, (and to a greater length than I wish,) how I understand this difficult and momentous subject.

* The lapse of fifteen days being required between arraignment and trial.

The law, as it regards this most unfortunate infirmity of the human mind, like the law in all its branches, aims at the utmost degree of precision; but there are some subjects, as I have just observed to you, and the present is one of them, upon which it is extremely difficult to be precise. The general principle is clear, but the application is most difficult.

It is agreed by all jurists, and is established by the law of this and every other country, that it is the reason of man which makes him accountable for his actions, and that the deprivation of reason acquits him of crime. This principle is indisputable; yet so fearfully and wonderfully are we made, so infinitely subtle is the spiritual part of our being, so difficult is it to trace with accuracy the effect of diseased intellect upon human action, that I may appeal to all who hear me, whether there are any causes more difficult, or which, indeed, so often confound the learning of the judges themselves, as when insanity, or the effects and consequences of insanity, become the subjects of legal consideration and judgment. I shall pursue the subject as the Attorney-General has properly discussed it. I shall consider insanity as it annuls a man's dominion over property; as it dissolves his contracts and other acts which otherwise would be binding; and as it takes away his responsibility for crimes. If I could draw the line in a moment

between these two views of the subject, I am sure the judges will do me the justice to believe that I would fairly and candidly do so; but great difficulties press upon my mind, which oblige me to take a different course.

I agree with the Attorney-General, that the law, in neither civil nor criminal cases, will measure the degrees of men's understandings; and that a weak man, however much below the ordinary standard of human intellect, is not only responsible for crimes, but is bound by his contracts and may exercise dominion over his property. Sir Joseph Jekyll, in the duchess of Cleveland's case, took the clear legal distinction when he said, "The law will not measure the sizes of men's capacities, so as they be *compos mentis*."

Lord Coke, in speaking of the expression *non compos mentis*, says, "Many times, as here, the Latin word expresses the true sense, and calleth him not *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus*, *stultus*, or the like, for *non compos mentis* is the most sure and legal." He then says, "*Non compos mentis* is of four sorts: first, *ideota*, which, from his nativity, by a perpetual infirmity, is *non compos mentis*; secondly, he that by sickness, grief, or other accident, wholly loses his memory and understanding; third, a lunatic that hath sometimes his understanding, and sometimes not; *aliquando gaudet lucidis intervallis*; and, therefore,

he is called *non compos mentis* so long as he hath not understanding."

But notwithstanding the precision with which this great author points out the different kinds of this unhappy malady, the nature of his work, in this part of it, did not open to any illustration which it can now be useful to consider. In his Fourth Institute he is more particular; but the admirable work of Lord Chief Justice Hale, in which he refers to Lord Coke's Pleas of the Crown, renders all other authorities unnecessary.

Lord Hale says: "There is a partial insanity of mind, and a total insanity. The former is either in respect to things, *quoad hoc vel illud insanire*. Some persons, that have a competent use of reason in respect of some subjects, are yet under a particular dementia in respect of some particular discourses, subjects or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons, that are felons of themselves and others, are under a degree of partial insanity, when they commit these offences. It is very difficult to define the invisible line that divides perfect and par-

tial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of inhumanity toward the defects of human nature; or, on the other side, too great an indulgence given to great crimes."

Nothing, gentlemen, can be more accurately nor more humanely expressed; but the application of the rule is often most difficult. I am bound, besides, to admit that there is a wide distinction between civil and criminal cases. If, in the former, a man appears, upon the evidence, to be *non compos mentis*, the law avoids his act, though it can not be traced or connected with the morbid imagination which constitutes his disease, and which may be extremely partial in its influence upon conduct; but to deliver a man from responsibility for crimes, above all, for crimes of great atrocity, and wickedness, I am by no means prepared to apply this rule, however well established when property only is concerned.

In the very recent instance of Mr. Greenwood (which must be fresh in his lordship's recollection), the rule in civil cases was considered to be settled. That gentleman, whilst insane, took up an idea that a most affectionate brother had administered poison to him. Indeed, it was the prominent feature of his insanity. In a few months he recovered his senses. He returned to his profession

as an advocate; was sound and eminent in his practice, and in all respects a most intelligent and useful member of society; but he could never dislodge from his mind the morbid delusion which disturbed it; and under the pressure, no doubt, of that diseased prepossession, he disinherited his brother. The cause to avoid this will was tried here. We are not now upon the evidence, but upon the principle adopted as the law. The noble and learned judge who presides upon this trial, and who presided upon that, told the jury, that if they believed Mr. Greenwood, when he made the will, to have been insane, the will could not be supported, whether it had disinherited his brother, or not; that the act, no doubt, strongly confirmed the existence of the false idea which, if believed by the jury to amount to madness, would equally have affected his testament, if the brother, instead of being disinherited, had been in his grave; and that, on the other hand, if the unfounded notion did not amount to madness, its influence could not vacate the devise.* This principle of law appears to be sound and reasonable as it applies to civil cases, from the extreme difficulty of tracing with precision the secret motions of a mind, deprived by disease of its soundness and strength.

Whenever, therefore, a person may be con-

* *N. B.* The jury found for the will; but after a contrary verdict in the Common Pleas, a compromise took place.

sidered *non compos mentis*, all his civil acts are void, whether they can be referred or not, to the morbid impulse of his malady, or even though, to all visible appearances, totally separated from it; but I agree with Mr. Justice Tracey, that it is not every man of an idle, frantic appearance and behavior, who is to be considered as a lunatic, either as it regards obligations or crimes; but that he must appear to the jury to be *non compos mentis*, in the legal acceptation of the term; and that, not at any anterior period, which can have no bearing upon any case whatsoever, but at the moment when the contract was entered into, or the crime committed.

The Attorney-General, standing undoubtedly upon the most revered authorities of the law, has laid it down, that to protect a man from criminal responsibility there must be a total deprivation of memory and understanding. I admit that this is the very expression used, both by Lord Coke and Lord Hale, but the true interpretation of it deserves the utmost attention and consideration of the court. If a total deprivation of memory was intended by these great lawyers to be taken in the literal sense of the words—if it was meant that, to protect a man from punishment, he must be in such a state of prostrated intellect, as not to know his name, nor his condition, nor his relation toward others—that if a husband, he should not know he was mar-

ried; or, if a father, could not remember that he had children; nor know the road to his house, nor his property in it—then no such madness ever existed in the world. It is idiocy alone which places a man in this helpless condition; where, from an original mal-organization, there is the human frame alone without the human capacity; and which, indeed, meets the very definition of Lord Hale himself, when, referring to Fitzherbert, he says: “*Ideocy or fatuity a nativitate, vel dementia naturalis*, is such a one as described by Fitzherbert, who knows not to tell twenty shillings, nor knows his own age, or who was his father.” But in all the cases which have filled Westminster Hall with the most complicated considerations—the lunatics and other insane persons who have been the subjects of them, have not only had memory, in my sense of the expression—they have not only had the most perfect knowledge and recollection of all the relations they stood in toward others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable—the disease consisting in the delusive sources of thought—all their deductions within the scope of the malady, being founded upon the immovable assumption of matters as realities, either without any foundation whatsoever, or so distorted and disfigured by fancy, as to be

almost nearly the same thing as their creation. It is true, indeed, that in some, perhaps in many cases, the human mind is stormed in its citadel, and laid prostrate under the stroke of frenzy; these unhappy sufferers, however, are not so much considered, by physicians, as maniacs, but to be in a state of delirium, as from fever. There, indeed, all the ideas are overwhelmed—for reason is not merely disturbed, but driven wholly from her seat. Such unhappy patients are unconscious, therefore, except at short intervals, even of external objects; or, at least, are wholly incapable of considering their relations. Such persons, and such persons alone (except idiots), are wholly deprived of their understandings, in the Attorney-General's seeming sense of that expression. But these cases are not only extremely rare, but never can become the subjects of judicial difficulty. There can be but one judgment concerning them. In other cases, reason is not driven from her seat, but distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety. Such patients are victims to delusions of the most alarming description, which so overpower the faculties, and usurp so firmly the place of realities, as not to be dislodged and shaken by the organs of perception and sense; in such cases the images frequently vary, but in the same subject are generally of the same terrific character. Here,

too, no judicial difficulties can present themselves ; for who could balance upon the judgment to be pronounced in cases of such extreme disease ? Another class, branching out into almost infinite subdivisions, under which, indeed, the former, and every case of insanity may be classed, is, where the delusions are not of that frightful character, but infinitely various, and often extremely circumscribed ; yet where imagination (within the bounds of the malady), still holds the most uncontrollable dominion over reality and fact ; and these are the cases which frequently mock the wisdom of the wisest in judicial trials ; because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind ; their conclusions are just, and frequently profound ; but the premises from which they reason, when within the range of the malady, are uniformly false ; not false from any defect of knowledge or judgment, but because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance, because unconscious of attack.

Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity ; and where it can not be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted ; and if courts of law were to be governed by any other principle, every

departure from sober, rational conduct would be an emancipation from criminal justice. I shall place my claim to your verdict upon no such dangerous foundation. I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the immediate, unqualified offspring of the disease. In civil cases, as I have already said, the law avoids every act of the lunatic during the period of the lunacy; although the delusion may be extremely circumscribed; although the mind may be quite sound in all that is not within the shades of the very partial eclipse; and although the act to be avoided can in no way be connected with the influence of the insanity. But to deliver a lunatic from responsibility to criminal justice, above all, in a case of such atrocity as the present, the relation between the disease and the act should be apparent. Where the connection is doubtful, the judgment should certainly be most indulgent, from the great difficulty of diving into the secret sources of a disordered mind. But still, I think, that as a doctrine of law, the delusion and the act should be connected.

You perceive, therefore, gentlemen, that the prisoner, in naming me for his counsel, has not obtained the assistance of a person who is disposed to carry the doctrine of insanity in his defence, so far as even the books would warrant me in carry-

ing it. Some of the cases, that of Lord Ferrers, for instance, which I shall consider hereafter, distinguished from the present, would not, in my mind, bear the shadow of an argument as a defence against an indictment for murder ; I can not allow the protection of insanity to a man who only exhibits violent passions and malignant resentments, acting upon real circumstances ; who is impelled to evil from no morbid delusions ; but who proceeds upon the ordinary perceptions of the mind. I can not consider such a man as falling within the protection which the law gives, and is bound to give, to those whom it has pleased God, for mysterious causes, to visit with this most afflicting calamity.

He alone can be so emancipated, whose disease (call it what you will) consists not merely in seeing with a prejudiced eye, or with odd and absurd particularities, differing in many respects from the contemplations of sober sense, upon the actual existence of things ; but he only, whose whole reasoning and corresponding conduct, though governed by the ordinary dictates of reason, proceed upon something which has no foundation or existence.

Gentlemen, it has pleased God so to visit the unhappy man before you—to shake his reason in its citadel—to cause him to build up as realities the most impossible phantoms of the mind, and to be impelled by them as motives irresistible ; the

whole fabric being nothing but the unhappy vision of his disease—existing no where else—having no foundation whatsoever in the very nature of things.

Gentlemen, it has been stated by the Attorney-General, and established by evidence, which I am in no condition to contradict, nor have, indeed, any interest in contradicting, that, when the prisoner bought the pistol, which he discharged at, or toward His Majesty, he was well acquainted with the nature and use of it; that, as a soldier, he could not but know that in his hands it was a sure instrument of death; that when he bought the gunpowder, he knew it would prepare the pistol for its use; that when he went to the play house, he knew he was going there, and every thing connected with the scene, as perfectly as any other person. I freely admit all this; I admit, also, that every person who listened to his conversation, and observed his deportment upon his apprehension, must have given precisely the evidence delivered by his royal highness the Duke of York; and that nothing like insanity appeared to those who examined him. But what then? I conceive, gentlemen, that I am more in the habit of examination, than either that illustrious person, or the witnesses from whom you have heard this account; yet, I well remember (indeed I never can forget it), that since the noble and learned judge has presided in

This court, I examined, for the greater part of a day, in this very place, an unfortunate gentleman who had indicted a most affectionate brother, together with the keeper of a mad-house at Hoxton, for having imprisoned him as a lunatic; whilst, according to his evidence, he was in his perfect senses. I was, unfortunately, not instructed in what his lunacy consisted, although my instructions left me no doubt of the fact; but, not having the clue, he completely foiled me in every attempt to expose his infirmity. You may believe that I left no means unemployed which long experience dictated; but without the smallest effect. The day was wasted, and the prosecutor, by the most affecting history of unmerited suffering, appeared to the judge and jury, and to a humane English audience, as the victim of the most wanton and barbarous oppression; at last Dr. Sims came into court, who had been prevented, by business, from an earlier attendance, and whose name, by-the-by, I observe to-day in the list of the witnesses for the Crown. From Dr. Sims I soon learned that the very man whom I had been above an hour examining, and with every possible effort which counsel are so much in the habit of exerting, believed himself to be the Lord and Saviour of mankind; not merely at the time of his confinement, which was alone necessary for my defence, but during the whole time that he had been triumphing over every

attempt to surprise him in the concealment of his disease. I then affected to lament the indecency of my ignorant examination, when he expressed his forgiveness, and said, with the utmost gravity and emphasis, in the face of the whole court, "I am the Christ;" and so the cause ended. Gentlemen, this is not the only instance of the power of concealing this malady; I could consume the day if I were to enumerate them; but there is one so extremely remarkable, that I cannot help stating it.

Being engaged to attend the assizes at Chester upon a question of lunacy, and having been told that there had been a memorable case tried before Lord Mansfield in this place, I was anxious to procure a report of it; and from that great man himself (who within these walls will ever be revered, being then retired, in his extreme old age, to his seat near London, in my own neighborhood), I obtained the following account of it: "A man of the name of Wood," said Lord Mansfield, "had indicted Dr. Monro for keeping him as a prisoner (I believe in the same mad-house at Hoxton,) when he was sane. He underwent the most severe examination by the defendant's counsel without exposing his complaint; but Dr. Battye, having come upon the bench by me, and having desired me to ask him what had become of the princess whom he had corresponded with in

cherry-juice, he showed in a moment what he was. He answered, that there was nothing at all in that, because, having been (as every body knew), imprisoned in a high tower, and being debarred the use of ink, he had no other means of correspondence but by writing his letters in cherry-juice, and throwing them into the river which surrounded the tower, where the princess received them in a boat. There existed, of course, no tower, no imprisonment, no writing in cherry-juice, no river, no boat; but the whole the inveterate phantom of a morbid imagination. I immediately," continued Lord Mansfield, "directed Dr. Monro to be acquitted; but this man Wood, being a merchant in Philpot Lane, and having been carried through the city in his way to the mad-house, he indicted Dr. Monro over again, for the trespass and imprisonment in London, knowing that he had lost his cause by speaking of the princess at Westminster; and such," said Lord Mansfield, "is the extraordinary subtlety and cunning of madmen, that when he was cross-examined on the trial in London, as he had successfully been before, in order to expose his madness, all the ingenuity of the bar, and all the authority of the court, could not make him say a single syllable upon that topic, which had put an end to the indictment before, although he still had the same indelible impression upon his mind, as he signified to those who were near him; but,

conscious that the delusion had occasioned his defeat at Westminster, he obstinately persisted in holding it back.”*

Now, gentlemen, let us look to the application of these cases. I am not examining, for the present, whether either of these persons ought to have been acquitted, if they had stood in the place of the prisoner now before you; that is quite a distinct consideration, which we shall come to hereafter. The direct application of them is only this: that if I bring before you such evidence of the prisoner's insanity as, if believed to have really existed, shall, in the opinion of the court, as the rule for your verdict in point of law, be sufficient for his deliverance, then that you ought not to be shaken in giving full credit to such evidence, notwithstanding the report of those who were present at his apprehension, who describe him as discovering no symptom whatever of mental incapacity or disorder; because I have shown you that insane persons frequently appear in the utmost state of ability and composure, even in the highest paroxysms of insanity, except when frenzy is the characteristic of the disease. In this respect the cases I have cited to you, have the most decided application; because they apply to the overthrow of the whole of the evidence (admitting at the same

* This evidence at Westminster was then proved against him by the short-hand writer.

time the truth of it), by which the prisoner's case can alone be encountered.

But it is said, that whatever delusions may overshadow the mind, every person ought to be responsible for crimes, who has a knowledge of good and evil. I think I can presently convince you that there is something too general in this mode of considering the subject; and you do not, therefore, find any such proposition in the language of the celebrated writer alluded to by the Attorney-General in his speech. Let me suppose that the character of an insane delusion consisted in the belief that some given person was any brute animal, or an inanimate being, (and such cases have existed,) and that upon the trial of such a lunatic for murder, you firmly, upon your oaths, were convinced, upon the uncontradicted evidence of an hundred persons, that he believed the man he had destroyed, to have been a potter's vessel; that it was quite impossible to doubt that fact, although to all other intents and purposes he was sane; conversing, reasoning, and acting as men not in any manner tainted with insanity, converse and reason and conduct themselves; suppose, further, that he believed the man whom he destroyed, but whom he destroyed as a potter's vessel, to be the property of another; and that he had malice against such supposed person, and that he meant to injure him, knowing the act he was doing

to be malicious and injurious, and that, in short, he had full knowledge of all the principles of good and evil ; yet, would it be possible to convict such a person of murder, if, from the influence of his disease, he was ignorant of the relation he stood in to the man he had destroyed, and was utterly unconscious that he had struck at the life of a human being ? I only put this case, and many others might be brought as examples, to illustrate that the knowledge of good and evil is too general a description.

I really think, however, that the Attorney-General and myself do not in substance very materially differ ; because, from the whole of his most able speech, taken together, his meaning may I think be thus collected ; that where the act which is criminal, is done under the dominion of malicious mischief and wicked intention, although such insanity might exist in a corner of the mind, as might avoid the acts of the delinquent, as a lunatic in a civil case, yet that he ought not to be protected, if malicious mischief, and not insanity, had impelled him to the act for which he was criminally to answer ; because, in such a case, the act might be justly ascribed to malignant motives and not to the dominion of the disease. I am not disposed to dispute such a proposition, in a case which would apply to it, and I can well conceive such cases may exist. The question, therefore,

which you will have to try, is this: Whether, when this unhappy man discharged the pistol in a direction which convinced and ought to convince every person that it was pointed at the person of the King, he meditated mischief and violence to His Majesty, or whether he came to the theatre (which it is my purpose to establish) under the dominion of the most melancholy insanity that ever degraded and overpowered the faculties of man. I admit that when he bought the pistol and the gunpowder to load it, and when he loaded it and came with it to the theatre, and lastly, when he discharged it—every one of these acts would be overt acts of compassing the King's death, if at all or any of these periods he was actuated by that mind and intention, which would have constituted murder in the case of an individual, if the individual had been actually killed. I admit, also, that the mischievous, and in this case the traitorous, intention must be inferred from all these acts unless I can rebut the inferences by proof. If I were to fire a pistol toward you, gentlemen, where you are now sitting, the act would undoubtedly infer malice. The whole proof, therefore, is undoubtedly cast upon me.

In every case of treason or murder, which are precisely the same, except that the unconsummated intention in the case of the King is the same as the actual murder of a private man, the

jury must impute to the person whom they condemn by their verdict, the motive which constitutes the crime ; and your province to-day will, therefore, be to decide whether the prisoner, when he did the act, was under the uncontrollable dominion of insanity, and was impelled to it by a morbid delusion, or whether it was the act of a man, who, though occasionally mad, or even at the time not perfectly collected, was yet not actuated by the disease, but by the suggestion of a wicked and malignant disposition.

I admit, therefore, freely, that if, after you have heard the evidence which I hasten to lay before you, of the state of the prisoner's mind, and close up to the very time of this catastrophe, you shall still not feel yourselves clearly justified in negating the wicked motives imputed by this indictment, I shall leave you in the hands of the learned judges to declare to you the law of the land, and shall not seek to place society in a state of uncertainty by any appeal addressed only to your compassion. I am appointed by the court to claim for the prisoner the full protection of the law, but not to misrepresent it in his protection.

Gentlemen, the facts of this melancholy case lie within a narrow compass. The unfortunate person before you was a soldier. He became so, I believe, in the year 1793, and is now about twenty-nine years of age. He served in Flanders,

under the Duke of York, as it appears by his royal highness' evidence; and being a most approved soldier, he was one of those singled out as an orderly man to attend upon the person of the commander-in-chief. You have been witnesses, gentlemen, to the calmness with which the prisoner has sitten in his place during the trial. There was but one exception to it. You saw the emotion which overpowered him when the illustrious person now in court, took his seat upon the bench. Can you then believe, from the evidence, for I do not ask you to judge as physiognomists, or to give the rein to compassionate fancy; but can there be any doubt that it was the generous emotion of the mind, on seeing the prince under whom he had served with so much bravery and honor? Every man, certainly, must judge for himself; I am counsel, not a witness, in the cause; but it is a most striking circumstance, when you find from the Crown's evidence, that when he was dragged through the orchestra under the stage, and charged with an act for which he considered his life as forfeited, he addressed the Duke of York with the same enthusiasm which has marked the demeanor I am adverting to. Mr. Richardson, who showed no disposition in his evidence to help the prisoner, but who spoke with the calmness and circumspection of truth, and who had no idea that the person he was examining was a lunatic, has

given you the account of the burst of affection on his first seeing the Duke of York, against whose father and Sovereign he was supposed to have had the consciousness of treason. The King himself, whom he was supposed to have so malignantly attacked, never had a more gallant, loyal or suffering soldier. His gallantry and loyalty will be proved; his sufferings speak for themselves.

About five miles from Lisle, upon the attack made on the British army, this unfortunate soldier was in the fifteenth light dragoons, in the thickest of the ranks, exposing his life for his prince, whom he is supposed to-day to have sought to murder. The first wound he received is most materially connected with the subject we are considering; you may see the effect of it now.* The point of a sword was impelled against him with all the force of a man urging his horse to battle. When the court put the prisoner under my protection, I thought it my duty to bring Mr. Cline to inspect him in Newgate; and it will appear by the evidence of that excellent and conscientious person, who is known to be one of the first anatomists in the world, that from this wound one of two things must have happened—either that by the immediate operation of surgery the displaced part of the skull must have been taken away, or been forced

*Mr. Erskine put his hand to the prisoner's head, who stood by him at the bar of the court.

inward on the brain. The second stroke, also, speaks for itself—you may now see its effects. (Here Mr. Erskine touched the head of the prisoner.) He was cut across all the nerves which give sensibility and animation to the body, and his head hung down almost dissevered, until by the act of surgery it was placed in the position you now see it; but thus, almost destroyed, he still recollected his duty, and continued to maintain the glory of his country, when a sword divided the membrane of his neck, where it terminates in the head; yet he still kept his place, though his helmet had been thrown off by the blow which I secondly described, when by another sword he was cut into the very brain—you may now see its membrane uncovered. Mr. Cline will tell you that he examined these wounds, and he can better describe them; I have myself seen them, but am no surgeon; from his evidence you will have to consider their consequences. It may be said that many soldiers receive grievous wounds without their producing insanity. So they may, undoubtedly; but we are here upon the fact. There was a discussion the other day, on whether a man who had been seemingly hurt by a fall, beyond remedy, could get up and walk; the people around said it was impossible, but he did get up and walk, and so there was an end to the impossibility. The effects of the prisoner's wounds were known

by the immediate event of insanity, and Mr. Cline will tell you that it would have been strange indeed if any other event had followed. We are not here upon a case of insanity, arising from the spiritual part of man, as it may be affected by hereditary taint, by intemperance, or by violent passions, the operations of which are various and uncertain; but we have to deal with a species of insanity more resembling what has been described as idiocy, proceeding from original mal-organization. There the disease is, from its very nature, incurable; and so where a man (like the prisoner) has become insane from violence to the brain, which permanently affects its structure, however such a man may appear occasionally to others, his disease is immovable; and if the prisoner, therefore, were to live a thousand years, he never could recover from the consequences of that day.

But this is not all. Another blow was still aimed at him, which he held up his arm to avoid, when his hand was cut into the bone. It is an afflicting subject, gentlemen, and better to be spoken of by those who understand it; and, to end all further description, he was then thrust almost through and through the body with a bayonet, and left in a ditch amongst the slain. He was afterwards carried to an hospital, where he was known by his tongue to one of his countrymen, who will be examined as a witness, who

found him, not merely as a wounded soldier, deprived of the powers of his body, but bereft of his senses forever.

He was affected from the very beginning with that species of madness, which, from violent agitation, fills the mind with the most inconceivable imaginations—wholly unfitting it for all dealing with human affairs, according to the sober estimate and standard of reason. He imagined that he had constant intercourse with the Almighty Author of all things—that the world was coming to a conclusion; and that, like our blessed Saviour, he was to sacrifice himself for its salvation; and so obstinately did this morbid image continue, that you will be convinced he went to the theatre to perform, as he imagined, that blessed sacrifice; and, because he would not be guilty of suicide, though called upon by the imperious voice of Heaven, he wished that by the appearance of crime his life might be taken away from him by others. This bewildered, extravagant species of madness appeared immediately after his wounds, on his first entering the hospital, and on the very same account he was discharged from the army on his return to England, which the Attorney-General very honorably and candidly seemed to intimate.

To proceed with the proofs of his insanity down to the very period of his supposed guilt. This unfortunate man before you is the father of an in-

fant of eight months ; and I have no doubt that if the boy had been brought into court, (but this is a grave place, for the consideration of justice, and not a theatre for stage effect,) I say I have no doubt, whatever, that if this poor infant had been brought into court, you would have seen the unhappy father wrung with all the emotions of parental affection ; yet, upon the Tuesday preceding the Thursday when he went to the play-house, you will find his disease still urging him forward, with the impression that the time was come when he must be destroyed for the benefit of mankind ; and in the confusion, or rather delirium, of this wild conception, he came to the bed of the mother, who had this infant in her arms, and endeavored to dash out its brains against the wall. The family was alarmed, and the neighbors being called in, the child was with difficulty rescued from the unhappy parent, who, in his madness, would have destroyed it.

Now let me, for a moment, suppose that he had succeeded in the accomplishment of his insane purpose ; and the question had been whether he was guilty of murder. Surely the affection for this infant, up to the very moment of his distracted violence, would have been conclusive in his favor ; but not more so than his loyalty to the King and his attachment to the Duke of York, as applicable to the case before us ; yet at that very period,

even of extreme distraction, he conversed as rationally on all other subjects, as he did to the Duke of York at the theatre. The prisoner knew perfectly that he was the husband of the woman, and the father of the child; the tears of affection ran down his face at the very moment that he was about to accomplish its destruction; but during the whole of this scene of horror, he was not at all deprived of memory, in the Attorney-General's sense of the expression; he could have communicated at that moment every circumstance of his past life, and every thing connected with his present condition, except, only, the quality of the act he was meditating. In that he was under the over-ruling dominion of a morbid imagination, and conceived that he was acting against the dictates of nature, in obedience to the superior commands of Heaven, which had told him that the moment he was dead, and the infant with him, all nature was to be changed, and all mankind were to be redeemed by his dissolution. There was not an idea in his mind, from the beginning to the end, of the destruction of the King; on the contrary, he always maintained his loyalty—lamented that he could not go again to fight his battles in the field, and it will be proved that only a few days before the period in question, being present when a song was sung, indecent, as it regarded the person and condition of His Majesty, he left the room with loud

expressions of indignation, and immediately sung God save the King, with all the enthusiasm of an old soldier, who had bled in the service of his country.

I confess to you, gentlemen, that this last circumstance, which may to some appear insignificant, is in my mind most momentous testimony; because, if this man had been in the habit of associating with persons inimical to the government of our country, so that mischief might have been fairly argued to have mixed itself with madness, (which, by the bye, it frequently does;) if it could in any way have been collected, that from his disorder more easily inflamed and worked upon, he had been led away by disaffected persons to become the instrument of wickedness; if it could have been established that such had been his companions and his habits, I should have been ashamed to lift up my voice in his defence. I should have felt that however his mind might have been weak and disordered, yet if his understanding sufficiently existed to be methodically acted upon as an instrument of malice, I could not have asked for an acquittal; but you find, on the contrary, in the case before you, that, notwithstanding the opportunity which the Crown has had, and which, upon all such occasions, it justly employs to detect treason, either against the person of the King, or against his government, not one witness has been able to

fix upon the prisoner before you any one companion of even a doubtful description, or any one expression from which disloyalty could be inferred ; while the whole history of his life repels the imputation. His courage in defence of the King and his dominions, and his affection for his son, in such unanswerable evidence, all speak aloud against the presumption that he went to the theatre with a mischievous intention.

To recur again to the evidence of Mr. Richardson, who delivered most honorable and impartial testimony : I certainly am obliged to admit that what a prisoner says for himself, when coupled at the very time with an overt act of wickedness, is no evidence, whatever, to alter the obvious quality of the act he has committed. If, for instance, I, who am now addressing you, had fired the same pistol toward the box of the King, and, having been dragged under the orchestra and secured for criminal justice, I had said that I had no intention to kill the King, but was weary of my life and meant to be condemned as guilty ; would any man, who was not himself insane, consider that as a defence ? Certainly not ; because it would be without the whole foundation of the prisoner's previous condition—part of which it is even difficult to apply closely and directly by strict evidence without taking his undoubted insanity into consideration ; because it is his unquestionable insanity which

alone stamps the effusions of his mind with sincerity and truth.

The idea which has impressed itself, but in most confused images, upon this unfortunate man, was that he must be destroyed, but ought not to destroy himself. He once had the idea of firing over the King's carriage in the street; but then he imagined he should be immediately killed, which was not the mode of propitiation for the world, and as our Saviour, before his passion, had gone into the garden to pray, this fallen and afflicted being, after he had taken the infant out of bed to destroy it, returned also to the garden, saying, as he afterwards said to the Duke of York, "that all was not over—that a great work was to be finished;" and there he remained in prayer, the victim of the same melancholy visitation.

Gentlemen, these are the facts, freed from even the possibility of artifice or disguise; because the testimony to support them will be beyond all doubt; and in contemplating the law of the country, and the precedents of its justice to which they must be applied, I find nothing to challenge or question—I approve of them throughout—I subscribe to all that is written by Lord Hale—I agree with all the authorities cited by the Attorney-General from Lord Coke; but, above all, I do most cordially agree in the instance of convictions by which he illustrated them in his able address. I

have now lying before me the case of Earl Ferrers—unquestionably there could not be a shadow of doubt, and none appears to have been entertained, of his guilt. I wish, indeed, nothing more than to contrast the two cases; and so far am I from disputing either the principle of that condemnation or the evidence that was the foundation of it, that I invite you to examine whether any two instances in the whole body of the criminal law are more diametrically opposite to each other, than the case of Earl Ferrers and that now before you. Lord Ferrers was divorced from his wife by act of Parliament; and a person of the name of Johnson, who had been his steward, had taken part with the lady in that proceeding, and had conducted the business in carrying the act through the two houses. Lord Ferrers, consequently, wished to turn him out of a farm which he occupied under him; but his estate being in trust, Johnson was supported by the trustees in his possession; there were also some differences respecting coal-mines; and in consequence of both transactions, Lord Ferrers took up the most violent resentment against him. Let me here observe, gentlemen, that this was not a resentment founded upon any illusion; not a resentment forced upon a distempered mind by fallacious images, but depending upon actual circumstances and real facts; and acting like any other man under the influence

of malignant passions, he repeatedly declared that he would be revenged on Mr. Johnson, particularly for the part he had taken in depriving him of a contract respecting the mines.

Now suppose Lord Ferrers could have showed that no difference with Mr. Johnson had ever existed regarding his wife, at all—that Mr. Johnson had never been his steward, and that he had only from delusion believed so when his situation in life was quite different. Suppose, further, that an illusive imagination had alone suggested to him that he had been thwarted by Johnson, in his contract for these coal mines, there never having been any contract at all for coal mines; in short, that the whole basis of his enmity was without any foundation in nature, and had been shown to have been a morbid image imperiously fastened upon his mind. Such a case as that would have exhibited a character of insanity in Lord Ferrers, extremely different from that in which it was presented by the evidence to his peers. Before them he only appeared as a man of turbulent passions, whose mind was disturbed by no fallacious images of things without existence; whose quarrel with Johnson was founded upon no illusions, but upon existing facts; and whose resentment proceeded to the fatal consummation with all the ordinary indications of mischief and malice; and who conducted his own defence with the greatest dexterity and

skill. Who then could doubt that Lord Ferrers was a murderer? When the act was done, he said, "I am glad I have done it. He was a villain, and I am revenged;" but when he afterwards saw that the wound was probably mortal, and that it involved consequences fatal to himself, he desired the surgeon to take all possible care of his patient, and, conscious of his crime, kept at bay the men who came to arrest him; showing, from the beginning to the end, nothing that does not generally accompany the crime for which he was condemned. He was proved, to be sure, to be a man subject to unreasonable prejudices, addicted to absurd practices and agitated by violent passions; but the act was not done under the dominion of uncontrollable disease; and whether the mischief and malice were substantive, or marked in the mind of a man whose passions bordered upon, or even amounted to insanity, it did not convince the Lords, that, under all the circumstances of the case, he was not a fit object of criminal justice.

In the same manner, Arnold, who shot at Lord Onslow, and who was tried at Kingston soon after the black act passed on the accession of George I. Lord Onslow having been very vigilant as a magistrate, in suppressing clubs which were supposed to have been set on foot to disturb the new government, Arnold had frequently been heard to declare that Lord Onslow would ruin his country;



and although he appeared from the evidence to be a man of most wild and turbulent manners, yet the people round Guilford, who knew him, did not, in general, consider him to be insane. His counsel could not show that any morbid delusion had ever overshadowed his understanding. They could not show, as I shall, that just before he shot at Lord Onslow, he had endeavored to destroy his own beloved child. It was a case of human resentment.

I might instance, also, the case of Oliver, who was indicted for the murder of Mr. Wood, a potter, in Staffordshire. Mr. Wood had refused his daughter to this man in marriage. My friend Mr. Milles was counsel for him at the assizes. He had been employed as a surgeon and apothecary by the father, who forbid him his house, and desired him to bring in his bill for payment; when in the agony of disappointment, and brooding over the injury he had suffered, on his being admitted to Mr. Wood to receive payment, he shot him upon the spot. The trial occupied a great part of the day, yet, for my own part, I can not conceive that there was any thing in the case for a jury to deliberate on. He was a man acting upon existing facts, and upon human resentments connected with them. He was at the very time carrying on his business, which required learning and reflection, and, indeed, a reach of mind beyond the ordinary

standard, being trusted by all who knew him, as a practiser in medicine. Neither did he go to Mr. Wood's under the influence of illusion; but he went to destroy the life of a man who was placed exactly in the circumstances which the mind of the criminal represented him. He went to execute vengeance on him for refusing his daughter. In such a case, there might, no doubt, be passion approaching to frenzy, but there wanted that characteristic of madness to emancipate him from criminal justice.

There was another instance of this description in the case of a most unhappy woman, who was tried in Essex for the murder of Mr. Errington, who had seduced and abandoned her and the children she had borne to him. It must be a consolation to those who prosecuted her that she was acquitted, as she is at this time in a most undoubted and deplorable state of insanity; but I confess, if I had been upon the jury who tried her, I should have entertained great doubts and difficulties; for although the unhappy woman had before exhibited strong marks of insanity arising from grief and disappointment, yet she acted upon facts and circumstances which had an existence and which were calculated, upon the ordinary principles of human action, to produce the most violent resentment. Mr. Errington having just cast her off and married another woman, or taken

her under his protection, her jealousy was excited to such a pitch as occasionally to overpower her understanding ; but when she went to Mr. Errington's house, where she shot him, she went with the express and deliberate purpose of shooting him. That fact was unquestionable—she went there with a resentment long rankling in her bosom—bottomed on an existing foundation ; she did not act under a delusion that he had deserted her, when he had not, but took revenge upon him for an actual desertion ; but still the jury, in the humane consideration of her sufferings, pronounced the insanity to be predominant over resentment, and they acquitted her.

But let me suppose (which would liken it to the case before us), that she had never cohabited with Mr. Errington ; that she never had had children by him ; and, consequently, that he never had, nor could possibly have deserted her. Let me suppose, in short, that she had never seen him in her life, but that her resentment had been founded on the morbid delusion that Mr. Errington, who had never seen her, had been the author of all her wrongs and sorrows ; and that under that diseased impression she had shot him. If that had been the case, gentlemen, she would have been acquitted upon the opening, and no judge would have sat to try such a cause ; the act itself would have been decisively characteristic of madness, because,

being founded upon nothing existing, it could not have proceeded from malice, which the law requires to be charged and proved, in every case of murder, as the foundation of a conviction.

Let us now recur to the cause we are engaged in, and examine it upon those principles by which I am ready to stand or fall, in the judgment of the court. You have a man before you, who will appear upon the evidence, to have received those almost deadly wounds which I described to you, producing the immediate and immoveable effects which the eminent surgeon, whose name I have mentioned, will prove that they could not but have produced; it will appear that from that period he was visited with the severest paroxysms of madness, and was repeatedly confined with all the coercion which it is necessary to practice upon lunatics; yet, what is quite decisive against the imputation of treason against the person of the King, his loyalty never forsook him. Sane or insane, it was his very characteristic to love his Sovereign and his country, although the delusions which distracted him were sometimes, in other respects, as contradictory as they were violent. Of this inconsistency there was a most striking instance on only the Tuesday before the Thursday in question, when it will be proved that he went to see one Truelet, who had been committed by the Duke of Portland, as a lunatic. This man had taken up

an idea that our Saviour's second advent, and the dissolution of all human things, were at hand; and conversed in this strain of madness—this mixing itself with the insane delusion of the prisoner, he immediately broke out upon the subject of his own propitiation and sacrifice for mankind, although only the day before he had exclaimed that the virgin Mary was whore—that Christ was a bastard—that God was a thief; and that he and this Truelet were to live with him at White Conduit house, and there to be enthroned together. His mind, in short, was overpowered and overwhelmed with distraction.

The charge against the prisoner is the overt act in compassing the death of the King, in firing a pistol at His Majesty—an act which only differs from murder inasmuch as the bare compassing is equal to the accomplishment of the malignant purpose; and it will be your office, under the advice of the judge, to decide by your verdict to which of the two impulses of the mind you refer the act in question; you will have to decide whether you attribute it wholly to mischief and malice, or wholly to insanity, or to the one mixing itself with the other. If you find it attributable to mischief and malice only, let the man die. The law demands his death for the public safety. If you consider it as conscious malice and mischief mixing itself with insanity, I leave him in the hands of the

court, to say how he is to be dealt with; it is a question too difficult for me. I do not stand here to disturb the order of society, or to bring confusion upon my country; but, if you find that the act was committed wholly under the dominion of insanity—if you are satisfied that he went to the theatre contemplating his own destruction only, and that, when he fired the pistol, he did not maliciously aim at the person of the King—you will then be bound, even upon the principle which the Attorney-General himself humanely and honorably stated to you, to acquit this most unhappy prisoner.

If, in bringing these considerations hereafter to the standard of the evidence, any doubts should occur to you on the subject, the question for your decision will then be, which of the two alternatives is the most probable—a duty which you will perform by the exercise of that reason of which, for wise purposes, it has pleased God to deprive the unfortunate man whom you are trying; your sound understandings will easily enable you to distinguish infirmities which are misfortunes, from motives which are crimes. Before the day ends the evidence will be decisive upon this subject.

There is, however, another consideration which I ought distinctly to present to you; because I think that more turns upon it than any other view of the subject, namely: whether the prisoner's

defence can be impeached for artifice or fraud; because I admit that if, at the moment when he was apprehended, there can be fairly imputed to him any pretence or counterfeit of insanity, it would taint the whole case, and leave him without protection; but for such a suspicion there is not even a shadow of foundation. It is repelled by the whole history and character of his disease, as well as of his life, independent of it. If you were trying a man, under the black act, for shooting at another, and there was a doubt upon the question of malice, would it not be important, or rather decisive, evidence, that the prisoner had no resentment against the prosecutor, but that, on the contrary, he was a man whom he had always loved and served? Now the prisoner was maimed, cut down, and destroyed, in the service of the King.

Gentlemen, another reflection presses very strongly on my mind, which I find it difficult to suppress. In every state there are political differences and parties, and individuals disaffected to the system of government under which they live as subjects. There are not many such, I trust, in this country; but whether there are many or any of such persons, there is one circumstance which has peculiarly distinguished His Majesty's life and reign, and which is in itself as a host in the prisoner's defence—since amidst all the treasons and all the

seditions which have been charged on reformers of government as conspiracies to disturb it, no hand or voice has been lifted up against the person of the King; there have, indeed, been unhappy lunatics, who, from ideas too often mixing themselves with insanity, have intruded themselves into the palace; but no malicious attack has ever been made upon the King, to be settled by a trial. His Majesty's character and conduct have been a safer shield than guards or than laws. Gentlemen, I wish to continue to that sacred life the best of all securities—I seek to continue it under that protection where it has been so long protected. We are not to do evil that good may come of it; we are not to stretch the laws to hedge round the life of the King with a greater security than that which the Divine Providence has so happily realized.

Perhaps there is no principle of religion more strongly inculcated by the sacred scriptures than by that beautiful and encouraging lesson of our Savior himself upon confidence in the divine protection: "Take no heed for your life, what ye shall eat, or what ye shall drink, or wherewithal ye shall be clothed; but seek ye first the kingdom of God, and all these things shall be added unto you." By which it is undoubtedly not intended that we are to disregard the conservation of life, or to neglect the means necessary for its sustentation, nor that we are to be careless of whatever

may contribute to our comfort and happiness ; but that we should be contented to receive them as they are given to us, and not seek them in the violation of the rule and order appointed for the government of the world. On this principle nothing can more tend to the security of His Majesty and his government, than the scene which this day exhibits in the calm, humane, and impartial administration of justice ; and if, in my part of this solemn duty, I have in any manner trespassed upon the just security provided for the public happiness, I wish to be corrected. I declare to you, solemnly, that my only aim has been to secure for the prisoner at the bar, whose life and death are in the balance, that he should be judged rigidly by the evidence and the law. I have made no appeal to your passions—you have no right to exercise them. This is not even a case in which, if the prisoner be found guilty, the royal mercy should be counseled to interfere ; he is either an accountable being, or not accountable ; if he was unconscious of the mischief he was engaged in, the law is a corollary, and he is not guilty ; but if, when the evidence closes, you think he was conscious, and maliciously meditated the treason he is charged with, it is impossible to conceive a crime more vile and detestable ; and I should consider the King's life to be ill attended to, indeed, if not protected by the full vigor of the laws, which are

watchful over the security of the meanest of his subjects. It is a most important consideration, both as it regards the prisoner and the community of which he is a member. Gentlemen, I leave it with you.

SPEECH
FOR THE
REV. GEORGE MARKHAM,
AGAINST
JOHN FAWCETT, ESQ.,
FOR
CRIMINAL CONVERSATION WITH THE PLAINTIFF'S WIFE.

May 4th, 1802.

Notwithstanding Mr. Erskine's remarkable success in all classes of cases in which, during his practice of over a quarter of a century, he was retained, he was thought to excel chiefly in actions for criminal conversation. To such an extent were his services sought in this class of cases, that, with few exceptions, he was seldom allowed to defend an action of this nature, being almost invariably retained for the plaintiff. So extraordinary was his success, that it grew to be matter of common remark that, with Kenyon upon the bench and Erskine at the bar, larger damages were allowed in actions for adultery than could be altogether vindicated by judicial precedents or judicial reasoning. Be this as it may, it is certain that he obtained heavier damages than any advocate in England, and in many cases jurors returned verdicts absolutely vindictive.

The circumstances attending the case of Markham *vs.* Fawcett are sufficiently detailed in the speech of Mr. Erskine. No evidence was adduced upon behalf of the defendant, he having allowed judgment to be taken against

him by default. It only remained, therefore, to take an inquisition of damages, which was accordingly done on the 4th of May, 1802, before the sheriff of Middlesex and a special jury, at the King's Arms Tavern, in Palace Yard, Westminster. The jury found a verdict, with seven thousand pounds damages, which were never levied, the defendant having left the kingdom.

SPEECH OF MR. ERSKINE.

MR. SHERIFF, AND GENTLEMEN OF THE JURY:
In representing the unfortunate gentleman who has sustained the injury which has been stated to you by my learned friend, Mr. Holroyd, who opened the pleadings, I feel one great satisfaction, a satisfaction founded, as I conceive, on a sentiment perfectly constitutional. I am about to address myself to men whom I personally know; to men honorable in their lives—moral, judicious, and capable of correctly estimating the injuries they are called upon to condemn in their character of jurors. This, gentlemen, is the only country in the world where there is such a tribunal as the one before which I am now to speak; for, however in other countries such institutions as our own may have been set up of late, it is only by that maturity which it requires ages to give to governments—by that progressive wisdom which has slowly ripened the constitution of our country, that it is possible there can exist such a body of men as you are. It is the great privilege of the subjects of England that they judge one another. It is to be recollected that, although we are in this private room, all the sanctions of justice are present. It makes no manner of difference whether I address

you in the presence of the under-sheriff, your respectable chairman, or with the assistance of the highest magistrate of the state.

The defendant has on this occasion suffered judgment by default—other adulterers have done so before him. Some have done so under the idea that by suffering judgment against them they had retired from the public eye—from the awful presence of the judge; and that they came into a corner where there was not such an assembly of persons to witness their misconduct, and where it was to be canvassed before persons who might be less qualified to judge the case to be addressed to them.

It is not long, however, since such persons have had an opportunity of judging how much they were mistaken in this respect—the largest damages, in cases of adultery, have been given in this place. By this place, I do not mean the particular room in which we are now assembled, but under inquisitions ordered by the sheriff; and the instances to which I allude are of modern and, indeed, recent date.

Gentlemen, after all the experience I have had, I feel myself, I confess, considerably embarrassed in what manner to address you. There are some subjects that harrass and overwhelm the mind of man. There are some kinds of distresses one knows not how to deal with. It is impossible to

contemplate the situation of the plaintiff without being disqualified, in some degree, to represent it to others with effect. It is no less impossible for you, gentlemen, to receive on a sudden the impressions which have long been in my mind, without feeling overpowered with sensations, which, after all, had better be absent when men are called upon, in the exercise of duty, to pronounce a legal judgment.

The plaintiff is the third son of his grace the Archbishop of York, a clergyman of the Church of England, presented in the year 1791 to the living of Stokeley, in Yorkshire, and now, by His Majesty's favor, dean of the cathedral of York. He married, in the year 1789, Miss Sutton, the daughter of Sir Richard Sutton, Bart. of Norwood, in Yorkshire, a lady of great beauty and accomplishments, most virtuously educated, and who, but for the crime of the defendant which assembles you here, would, as she has expressed it herself, have been the happiest of womankind. This gentleman having been presented in 1791, by his father, to this living, where I understand there had been no resident rector for forty years, set an example to the church and to the public, which was peculiarly virtuous in a man circumstanced as he was; for, if there can be any person more likely than another to protect himself securely with privileges and indulgences, it might be sup-

posed to be the son of the metropolitan of the province. This gentleman, however, did not avail himself of the advantage of his birth and station ; for, although he was a very young man, he devoted himself entirely to the sacred duties of his profession. At a large expense he repaired the rectory-house for the reception of his family, as if it had been his own patrimony, whilst, in his extensive improvements, he adopted only those arrangements which were calculated to lay the foundation of an innocent and peaceful life. He had married this lady, and entertained no other thought than that of cheerfully devoting himself to all the duties, public and private, which his situation called upon him to perform.

About this time, or soon afterwards, the defendant became the purchaser of an estate in the neighborhood of Stokeley, and, by such purchase, an inhabitant of that part of the country, and the neighbor of this unfortunate gentleman. It is a most affecting circumstance, that the plaintiff and the defendant had been bred together at Westminster school, and in my mind it is still more affecting, when I reflect what it is which has given to that school so much rank, respect, and illustration. It has derived its highest advantages from the reverend father of the unfortunate gentleman whom I represent. It was the school of Westminster which gave birth to that learning which

afterwards presided over it, and advanced its character. However some men may be disposed to speak or write concerning public schools, I take upon me to say, they are among the wisest of our institutions. Whoever looks at the national character of the English people, and compares it with that of all the other nations upon the earth, will be driven to impute it to that reciprocation of ideas and sentiments which fill and fructify the mind in the early period of youth, and to the affectionate sympathies and friendships which rise up in the human heart before it is deadened and perverted by the interests and corruptions of the world. These youthful attachments are proverbial, and, indeed, few instances have occurred of any breaches of them; because a man, before he can depart from the obligations they impose, must have forsaken every principle of virtue, and every sentiment of manly honor. When, therefore, the plaintiff found his old schoolfellow and companion settled in his neighborhood, he immediately considered him as his brother. Indeed he might well consider him as a brother, since, after having been at Westminster, they were again thrown together in the same college at Oxford; so that the friendship they had formed in their youth, became cemented and consolidated upon their first entrance into the world. It is no wonder, therefore, that when the defendant came down to settle in the

neighborhood of the plaintiff, he should be attracted toward him by the impulse of his former attachment. He recommended him to the lord-lieutenant of the county, and, being himself a magistrate, he procured him a share in the magistracy. He introduced him to the respectable circle of his acquaintances; he invited him to his house, and cherished him there as a friend. It is this which renders the business of to-day most affecting, as it regards the plaintiff, and wicked in the extreme, as it relates to the defendant; because the confidences of friendship conferred the opportunities of seduction. The plaintiff had no pleasures or affections beyond the sphere of his domestic life, and, except on his occasional residences at York, which were but for short periods, and at a very inconsiderable distance from his home, he constantly reposed in the bosom of his family. I believe it will be impossible for my learned friend to invade his character; on the contrary, he will be found to have been a pattern of conjugal and parental affection.

Mr. Fawcett being thus settled in the neighborhood, and thus received by Mr. Markham as his friend and companion, it is needless to say he could harbor no suspicion that the defendant was meditating the seduction of his wife. There was nothing, indeed, in his conduct, or in the conduct of the unfortunate lady, that could administer any

cause of jealousy to the most guarded or suspicious temper. Yet, dreadful to relate, and it is, indeed, the bitterest evil of which the plaintiff has to complain, a criminal intercourse for nearly five years before the discovery of the connection had most probably taken place.

I leave you to consider what must have been the feelings of such a husband, upon the fatal discovery that his wife, and such a wife, had conducted herself in a manner that not merely deprived him of her society, but placed him in a situation too horrible to be described. If a man without children is suddenly cut off by an adulterer from all the comforts and happiness of marriage, the discovery of his condition is happiness itself when compared with that to which the plaintiff is reduced. When children, by a woman lost forever to the husband by the arts of the adulterer, are begotten in the unsuspected days of virtue and happiness, there remains a consolation—mixed, indeed, with the most painful reflections, yet a consolation still. But what is the plaintiff's situation? He does not know at what time this heavy calamity fell upon him—he is tortured with the most afflicting of all human sensations. When he looks at the children, whom he is by law bound to protect and to provide for, and from whose existence he ought to receive the delightful return which the union of instinct and reason has provi-

ded for the continuation of the world, he knows not whether he is lavishing his fondness and affection upon his own children, or upon the seed of a villain sown in the bed of his honor and his delight. He starts back with horror when, instead of seeing his own image reflected from their infant features, he thinks he sees the destroyer of his happiness—a midnight robber, introduced into his house under professions of friendship and brotherhood—a plunderer, not in the repositories of his treasure which may be supplied or lived without, “but there where he had garnered up his hopes; where either he must live, or bear no life.”

In this situation the plaintiff brings his case before you, and the defendant attempts no manner of defence; he admits his guilt; he renders it unnecessary for me to go into any proof of it; and the only question, therefore, that remains, is for you to say what shall be the consequences of his crime, and what verdict you will pronounce against him. You are placed, therefore, in a situation most momentous to the public; you have a duty to discharge, the result of which not only deeply affects the present generation, but which remotest posterity will contemplate to your honor or dishonor. On your verdict it depends whether persons of the description of the defendant, who have cast off all respect for religion, who laugh at morality when it is opposed to the gratification of their

passions, and who are careless of the injuries they inflict upon others, shall continue their impious and destructive course with impunity. On your verdict it depends whether such men, looking to the proceedings of courts of justice, shall be able to say to themselves that there are certain limits beyond which the damages of juries are not to pass. On your verdict it depends whether men of large fortune shall be able to adopt this kind of reasoning to spur them on in the career of their lusts: There are many chances that I may not be discovered at all; there are chances that if I am discovered I may not be the object of legal inquiry; and, supposing I should, there are certain damages beyond which a jury can not go; they may be large, but still within a certain compass; if I can not pay them myself there may be persons belonging to my family who will pity my situation—somehow or other the money may be raised, and I may be delivered from the consequences of my crime. I trust the verdict of this day will show men who reason thus that they are mistaken.

The action for adultery, like every other action, is to be considered according to the extent of the injury which the person complaining to a court of justice has received. If he has received an injury or sustained a loss that can be estimated directly in money, there is then no other medium of redress

but in moneys, numbered according to the extent of the proof. I apprehend it will not be even stated by the counsel for the defendant, that if a person has sustained a loss, and can show it is to any given extent, he is not entitled to the full measure of it in damages. If a man destroys my house or furniture, or deprives me of a chattel, I have a right, beyond all manner of doubt, to recover their corresponding values in money; and it is no answer to me to say, that he who has deprived me of the advantage I before possessed, is in no situation to render me satisfaction. A verdict pronounced upon such a principle, in any of the cases I have alluded to, would be set aside by the court and a new trial awarded. It would be a direct breach of the oaths of jurors, if, impressed with a firm conviction that a plaintiff had received damages to a given amount, they retired from their duty because they felt commiseration for a defendant, even in a case where he might be worthy of compassion from the injury being unpremeditated and inadvertent.

But there are other wrongs which can not be estimated in money:

“ You cannot minister to a mind diseas'd.”

You can not redress a man who is wronged beyond the possibility of redress—the law has no means of restoring to him what he has lost. God him-

self, as he has constituted human nature, has no means of alleviating such an injury as the one I have brought before you. While the sensibilities, affections, and feelings he has given to man remain, it is impossible to heal a wound which strikes so deep into the soul. When you have given to a plaintiff, in damages, all that figures can number, it is as nothing; he goes away, hanging down his head in sorrow, accompanied by his wretched family, dispirited and dejected. Nevertheless, the law has given a civil action for adultery and, strange to say, it has given nothing else. The law commands that the injury shall be compensated (as far as it is practicable) in money, because courts of civil justice have no other means of compensation than money; and the only question, therefore, and which you upon your oaths are to decide, is this: has the plaintiff sustained an injury up to the extent which he has complained of? Will twenty thousand pounds place him in the same condition of comfort and happiness that he enjoyed before the adultery, and which the adulterer has deprived him of? You know that it will not. Ask your own hearts the question, and you will receive the same answer. I should be glad to know, then, upon what principle, as it regards the private justice, which the plaintiff has a right to, or upon what principle, as the example of that justice affects the public and the remotest

generations of mankind, you can reduce this demand even a single farthing.

This is a doctrine which has been frequently countenanced by the noble and learned lord who lately presided in the Court of King's Bench;* but his lordship's reasoning on the subject has been much misunderstood and frequently misrepresented. The noble lord is supposed to have said, that although a plaintiff may not have sustained an injury by adultery to a given amount, yet that large damages, for the sake of public example, should be given. He never said any such thing. He said that which law and morals dictated to him, and which will support his reputation as long as law and morals have a footing in the world. He said that every plaintiff had a right to recover damages up to the extent of the injury he had received, and that public example stood in the way of showing favor to an adulterer by reducing the damages below the sum which the jury would otherwise consider as the lowest compensation for the wrong. If the plaintiff shows you that he was a most affectionate husband; that his parental and conjugal affections were the solace of his life; that for nothing the world could bestow, in the shape of riches or honors, would he have bartered one moment's comfort in the bosom of his family, he shows you a wrong that no money can compen-

*Lord Kenyon.

sate; nevertheless, if the injury is only measurable in money, and if you are sworn to make, upon your oaths, a pecuniary compensation, though I can conceive that the damages when given to the extent of the declaration, and you can give no more, may fall short of what your consciences would have dictated, yet I am utterly at a loss to comprehend upon what principle they can be lessened. But then comes the defendant's counsel, and says, "It is true that the injury can not be compensated by the sum which the plaintiff has demanded; but you will consider the miseries my client must suffer if you make him the object of a severe verdict. You must, therefore, regard him with compassion, though I am ready to admit that the plaintiff is to be compensated for the injury he has received."

Here, then, Lord Kenyon's doctrine deserves consideration. "He who will mitigate damages below the fair estimate of the wrong which he has committed, must do it upon some principle which the policy of the law will support."

Let me then examine whether the defendant is in a situation which entitles him to have the damages against him mitigated, when private justice to the injured party calls upon you to give them to the utmost farthing. The question will be, on what principle of mitigation can he stand before you? I had occasion, not a great while ago, to remark to a jury that the wholesome institutions

of the civilized world came seasonably in aid of the dispensations of Providence for our well-being in the world. If I were to ask what it is that prevents the prevalence of the crime of incest, by taking away those otherwise natural impulses from the promiscuous gratification of which we should become like the beasts of the field, and lose all the intellectual endearments which are at once the pride and the happiness of man? What is it that renders our houses pure, and our families innocent? It is that, by the wise institutions of all civilized nations, there is placed a kind of guard against the human passions, in that sense of impropriety and dishonor which the law has raised up, and impressed with almost the force of a second nature. This wise and politic restraint beats down, by the habits of the mind, even a propensity to incestuous commerce, and oppose those inclinations which nature, for wise purposes, has implanted in our breasts at the approach of the other sex. It holds the mind in chains against the seductions of beauty—it is a moral feeling in perpetual opposition to human infirmity—it is like an angel from heaven placed to guard us against propensities which are evil—it is that warning voice, gentlemen, which enables you to embrace your daughter, however lovely, without feeling that you are of a different sex—it is that which enables you, in the same manner, to live familiarly, with your nearest

female relations, without those desires which are natural to man.

Next to the tie of blood (if not, indeed, before it), is the sacred and spontaneous relation of friendship. The man who comes under the roof of a married friend ought to be under the dominion of the same moral restraint, and, thank God, generally is so, from the operation of the causes which I have described. Though not insensible to the charms of female beauty, he receives its impressions under a habitual reserve, which honor imposes. Hope is the parent of desire, and honor tells him he must not hope. Loose thoughts may arise, but they are rebuked and dissipated.

“ Evil into the mind of God or man
May come and go, so unapprov'd, and leave
No spot or blame behind.”

Gentlemen, I trouble you with these reflections that you may be able properly to appreciate the guilt of the defendant, and to show you that you are not in a case where large allowances are to be made for the ordinary infirmities of our imperfect natures. When a man does wrong in the heat of sudden passion, as, for instance, when, upon receiving an affront, he rushes into immediate violence, even to the deprivation of life, the humanity of the law classes his offence amongst the lower degrees of homicide. It supposes the crime to have been committed before the mind had time to par-

ley with itself. But is the criminal act of such a person, however disastrous may be the consequence, to be compared with that of the defendant? Invited into the house of a friend; received with the open arms of affection, as if the same parents had given them birth and bred them, in this situation this most monstrous and wicked defendant deliberately perpetrated his crime, and, shocking to relate, not only continued the appearances of friendship, after he had violated its most sacred obligations, but continued them as a cloak to the barbarous repetitions of his offence; writing letters of regard, whilst, perhaps, he was the father of the last child, whom his injured friend and companion was embracing and cherishing as his own. What protection can such conduct possibly receive from the humane consideration of the law for sudden and violent passions? A passion for a woman is progressive; it does not, like anger, gain an uncontrolled ascendancy in a moment, nor is a modest matron to be seduced in a day. Such a crime, can not, therefore, be committed under the resistless dominion of sudden infirmity; it must be deliberately, willfully, and wickedly committed. The defendant could not possibly have incurred the guilt of this adultery without often passing through his mind (for he had the education and principles of a gentleman) the very topics I have been insisting upon before you for his condemna-

tion. Instead of being suddenly impelled toward mischief, without leisure for such reflections, he had innumerable difficulties and obstacles to contend with. He could not but hear in the fresh refusals of this unhappy lady everything to awaken conscience, and even to excite horror. In the arguments he must have employed to seduce her from her duty, he could not but recollect, and willfully trample upon his own. He was a year engaged in the pursuit; he resorted repeatedly to his shameful purpose, and advanced to it at such intervals of time and distance, as entitle me to say that he determined in cold blood to enjoy a future and momentary gratification, at the expense of every principle of honor which is held sacred amongst gentlemen, even where no laws interpose their obligations or restraints.

I call upon you, therefore, gentlemen of the jury, to consider well this case, for it is your office to keep human life in tone; your verdict must decide whether such a case can be indulgently considered, without tearing asunder the bonds which unite society together.

Gentlemen, I am not preaching a religion which men can scarcely practice—I am not affecting a severity of morals beyond the standard of those whom I am accustomed to respect, and with whom I associate in common life—I am not making a stalking-horse of adultery to excite exaggerated

sentiment. This is not the case of a gentleman meeting a handsome woman in a public street, or in a place of public amusement; where, finding the coast clear for his addresses, without interruption from those who should interrupt, he finds himself engaged (probably the successor of another) in a vain and transitory intrigue. It is not the case of him who, night after night, falls in with the wife of another to whom he is a stranger, in the boxes of a theatre, or other resorts of pleasure, inviting admirers by indecent dress and deportment, unattended by any thing which bespeaks the affectionate wife, and mother of many children. Such connections may be of evil example; but I am not here to reform public manners, but to demand private justice. It is impossible to assimilate the sort of cases I have alluded to, which ever will be occasionally occurring, with this atrocious invasion of household peace—this portentous disregard of every thing held sacred amongst men, good or evil. Nothing, indeed, can be more affecting than even to be called upon to state the evidence I must bring before you. I can scarcely pronounce to you that the victim of the defendant's lust was the mother of nine children, seven of them females and infants, unconscious of their unhappy condition, deprived of their natural guardian, separated from her for ever, and entering the world with a dark cloud hanging over

them. But it is not in the descending line alone that the happiness of this worthy family is invaded. It hurts me to call before you the venerable progenitor of both the father and the children, who has risen by extraordinary learning and piety to his eminent rank in the church, and who, instead of receiving, unmixed and undisturbed, the best consolation of age, in counting up the number of his descendants, carrying down the name and honor of his house to future times, may be forced to turn aside his face from some of them, that bring to his remembrance the wrongs which now oppress him, and which it is his duty to forget, because it is his, otherwise impossible, duty to forgive them.

Gentlemen, if I make out this case by evidence (and, if I do not, forget every thing you have heard, and reproach me for having abused your honest feelings), I have established a claim for damages that has no parallel in the annals of fashionable adultery. It is rather like the entrance of sin and death into this lower world. The undone pair were living like our first parents in Paradise, till this demon saw and envied their happy condition. Like them, they were in a moment cast down from the pinnacle of human happiness into the very lowest abyss of sorrow and despair. In one point, indeed, the resemblance does not hold, which, while it aggravates

the crime, redoubles the sense of suffering. It was not from an enemy, but from a friend, that this evil proceeded. I have just had put into my hand a quotation from the Psalms upon this subject, full of that unaffected simplicity which so strikingly characterizes the sublime and sacred poet :

“It is not an open enemy that hath done me this dishonor, for then I could have borne it.

“Neither was it mine adversary that did magnify himself against me ; for then, peradventure, I would have hid myself from him.

“But it was even thou my companion, my guide, mine own familiar friend.”

This is not the language of counsel, but the inspired language of truth. I ask you, solemnly, upon your honors and your oaths, if you would exchange the plaintiff's former situation for his present, for an hundred times the compensation he requires at your hands. I am addressing myself to affectionate husbands and to the fathers of beloved children. Suppose I were to say to you, there is twenty thousand pounds for you—embrace your wife for the last time, and the child that leans upon her bosom and smiles upon you—retire from your house, and make way for the adulterer—wander about an object for the hand of scorn to point its slow and moving finger at—think no more of the happiness and tranquillity of your for-

mer state—I have destroyed them forever ; but never mind, don't make yourself uneasy ; here is a draft upon my banker, it will be paid at sight ; there is no better man in the city. I can see you think I am mocking you, gentlemen, and well you may, but it is the very pith and marrow of this cause. It is impossible to put the argument in mitigation of damages, in plain English, without talking such a language as appears little better than an insult to your understandings dress it up as you will.

But it may be asked, if no money can be an adequate or, indeed, any compensation, why is Mr. Markham a plaintiff in a civil action ? Why does he come here for money ? Thank God, gentlemen, it is not my fault. I take honor to myself that I was one of those who endeavored to put an end to this species of action, by the adoption of a more salutary course of proceeding. I take honor to myself that I was one of those who supported in Parliament the adoption of a law to pursue such outrages with the terrors of criminal justice. I thought then, and I shall always think, that every act *malum in se* directly injurious to an individual and most pernicious in its consequences to society should be considered to be a misdemeanor. Indeed, I know of no other definition of the term ; the legislature, however, thought otherwise, and I bow to its decision ; but the business of this day

may produce some changes of opinion on the subject. I never meant that every adultery was to be similarly considered. Undoubtedly there are cases where it is comparatively venial, and judges would not overlook the distinctions. I am not a pretender to any extraordinary purity. My severity is confined to cases in which there can be but one sentiment amongst men of honor, as to the offence, though they may differ in the mode and measure of its correction.

It is this difference of sentiment, gentlemen, that I am alone afraid of; I fear you may think there is a sort of limitation in verdicts, and that you may look to precedents for the amount of damages, though you can find no precedent for the magnitude of the crime; but you might as well abolish the action altogether, as lay down a principle which limits the consequences of adultery to what it may be convenient for the adulterer to pay. By the adoption of such a principle, or by any mitigation of severity, arising even from an insufficient reprobation of it, you unbar the sanctuary of domestic happiness and establish a sort of license for debauchery, to be sued out, like other licenses, at its price; a man has only to put money into his pocket, according to his degree and fortune, and he may then debauch the wife or daughter of his best friend, at the expense he chooses to go

to. He has only to say to himself what Iago says to Roderigo in the play—

“Put money in thy purse—go to—put money in thy purse.”

Persons of immense fortunes might in this way deprive the best men in the country of their domestic satisfactions, with what to them might be considered as impunity. The most abandoned profligate might say to himself or to other profligates, “I have suffered judgment by default; let them send down their deputy-sheriff to the King’s Arms tavern; I shall be concealed from the eye of the public. I have drawn upon my banker for the utmost damages, and I have as much more to spare to-morrow, if I can find another woman whom I would choose to enjoy at such a price.” In this manner I have seen a rich delinquent, too lightly fined by courts of criminal justice, throw down his bank-notes to the officers, and retire with a deportment not of contrition, but contempt.

For these reasons, gentlemen, I expect from you to-day the full measure of damages demanded by the plaintiff. Having given such a verdict, you will retire with a monitor within, confirming that you have done right—you will retire in sight of an approving public and an approving Heaven. Depend upon it, the world can not be held together without morals, nor can morals maintain their sta-

tion in the human heart without religion, which is the corner-stone of the fabric of human virtue.

We have lately had a most striking proof of this sublime and consoling truth, in one result, at least, of the revolution which has astonished and shaken the earth. Though a false philosophy was permitted for a season to raise up her vain fantastic front, and to trample down the Christian establishments and institutions, yet, on a sudden, God said, "Let there be light, and there was light." The altars of religion were restored; not purged indeed of human errors and superstitions—not reformed in the just sense of reformation—yet the Christian religion is still re-established, leading on to further reformation, fulfilling the hope that the doctrines and practice of Christianity shall overspread the face of the earth.

Gentlemen, as to us, we have nothing to wait for. We have long been in the centre of light. We have a true religion and a free government, and you are the pillars and supporters of both.

I have nothing further to add, except that since the defendant committed the injury complained of he has sold his estate, and is preparing to remove into some other country. Be it so. Let him remove; but you will have to pronounce the penalty of his return. It is for you to declare whether such a person is worthy to be a member of our community. But if the feebleness of your juris-

diction, or a commiseration which destroys the exercise of it, shall shelter such a criminal from the consequences of his crimes, individual security is gone, and the rights of the public are unprotected. Whether this be our condition or not, I shall know by your verdict.

MR. ERSKINE'S SPEECH

IN DEFENCE OF

THE HON. RICHARD BINGHAM,

IN AN ACTION FOR CRIMINAL CONVERSATION.

February 24th, 1794.

The case of Howard *vs.* Bingham was one of the few actions for adultery in which Mr. Erskine appeared for the defendant. The action was brought by Bernard Edward Howard, heir presumptive to the Duke of Norfolk, against the Hon. Richard Bingham, afterward Earl of Lucan, for adulterous intercourse with plaintiff's wife. A mutual attachment had formerly existed between the lady and the defendant, resulting in an engagement of marriage, which had been broken off by her parents for the more desirable offer of the plaintiff, whom she was compelled to marry. These circumstances were so skilfully used by Mr. Erskine in mitigation of damages as to make his client appear the party aggrieved, and to reduce the verdict to only five hundred pounds damages. The speech was delivered in the Court of King's Bench, on Monday, February 24th, 1794.

MR. ERSKINE.

GENTLEMEN OF THE JURY: My learned friend, as counsel for the plaintiff, has bespoke an address from me, as counsel for the defendant, which you must not, I assure you, expect to hear. He has thought it right (partly in courtesy to me, as I am willing to believe, and in part for the purposes of his cause), that you should suppose you are to be addressed with eloquence which I never possessed, and which if I did, I should be incapable at this moment of exerting; because the most eloquent man, in order to exert his eloquence, must have his mind free from embarrassment on the occasion on which he is to speak. I am not in that condition. My learned friend has expressed himself as the friend of the plaintiff's family. He does not regard that family more than I do; and I stand in the same predicament toward my own honorable client and his relations. I know him and them, and because I know them, I regard them also. My embarrassment, however, only arises at being obliged to discuss this question in a public court of justice, because, could it have been the subject of private reference, I should have felt none at all in being called upon to settle it.

Gentlemen, my embarrassment is abundantly in-

creased, when I see present a noble person, high, very high, in rank in this kingdom, but not higher in rank than he is in my estimation; I speak of the noble Duke of Norfolk, who most undoubtedly must feel not a little at being obliged to come here as a witness for the defendant in the cause of a plaintiff so nearly allied to himself. I am persuaded no man can have so little sensibility as not to feel that a person in my situation must be greatly embarrassed in discussing a question of this nature before such an audience, and between such parties as I have described.

Gentlemen, my learned friend desired you would take care not to suffer argument, or observation, or eloquence to be called into the field to detach your attention from the evidence in the case, upon which, alone, you ought to decide. I wish my learned friend, at the moment he gave you that caution, had not himself given testimony of a fact to which he stood the solitary witness. I wish he had not introduced his own evidence, without the ordinary ceremony of being sworn. I will not follow his example. I will not tell you what I know from the conversation of my client, nor give evidence of what I know myself. My learned friend tells you that nothing can exceed the agony of mind his client has suffered, and that no words can describe his adoration of the lady he has lost; these most material points of the cause rest, however,

altogether on the single, unsupported, unsworn evidence of the counsel for the plaintiff. No relation has been called upon to confirm them, though we are told that the whole house of Fauconberg, Bellasyse and Norfolk are in the avenues of the court, ready, it seems, to be called at my discretion ; and yet my learned friend is himself the only witness, though the facts (and most material facts, indeed, they would have been) might have been proved by so many illustrious persons.

Now to show you how little disposed I am to work upon you by any thing but by proof—to convince you how little desirous I am to practice the arts of speech as my only artillery in this cause, I will begin with a few plain dates, and, as you have pens in your hands, I will thank you to write them down. I shall begin with stating to you what my cause is, and shall then prove it—not by myself, but by witnesses.

The parties were married on the 24th of April, 1789. The child that has been spoken of, and in terms which gave me great satisfaction, as the admitted son of the plaintiff, blessed with the affection of his parent, and whom the noble person to whom he may become heir can look upon without any unpleasant reflection, that child was born on the 12th of August, 1791 ; take that date and my learned friend's admission that this child must have been the child of Mr. Howard, an admission

which could not have been rationally or consistently made, but upon the implied admission that no illicit connection had existed previously, by which its existence might have been referred to the defendant. On this subject, therefore, the plaintiff must be silent; he can not say the parental mind has been wrung; he can not say hereafter, "no son of mine succeeding;" he can say none of these things. The child was born on the 12th of August, 1791, and, as Mr. Howard is admitted to be the author of its existence, (which he must have been, if at all, in 1790,) I have a right to say, that during all that interval, this gentleman could not have had the least reasonable cause of complaint against Mr. Bingham; his jealousy must, of course, have begun after that period; for, had there been grounds for it before, there could be no sense in the admission of his counsel, nor any foundation for that parental consolation which was brought forward in the very front of the cause.

The next dry date is, therefore, the 24th of July, 1793; and I put it to his lordship that there is no manner of evidence which can be pressed into this cause previous to that time. Let me next disembarass the cause from another assertion of my learned friend, namely, that a divorce can not take place before the birth of this child; and that if the child happens to be a son, which is one contingency; and if the child so born does not die,

which is another contingency ; and if the noble duke dies without issue, which is a third contingency ; then this child might inherit the honors of the house of Norfolk—that I deny. My recent experience tells me the contrary. In a case where Mr. Stewart, a gentleman in Ireland, stood in a similar predicament, the Lords and Commons of England not only passed an act of divorce between him and his lady, but, on finding there was no access on the part of the husband, and that the child was not his, they bastardized the issue.

What then remains in this cause? Gentlemen, there remains only this. In what manner, when you have heard my evidence (for this is a cause which, like all others, must stand upon evidence), the plaintiff shall be able to prove what I have the noble judge's authority for saying he must prove, viz., the loss of the comfort and society of his wife, by the seduction of the defendant. That is the very gist of the action. The loss of her affection and of domestic happiness are the only legal foundations of his complaint.

Now, before any thing can be lost, it must have existed—before any thing can be taken away from a man, he must have had it—before the seduction of a woman's affections from her husband can take place, he must have possessed her affections.

Gentlemen, my friend, Mr. Mingay, acknowl-

edges this to be the law, and he shapes his case accordingly. He represents his client, a branch of a most illustrious house, as casting the eyes of affection upon a disengaged woman, and of rank equal to, or, at least, suitable to his own. He states a marriage of mutual affection, and endeavors to show that this young couple, with all the ardor of love, flew into each other's embraces. He shows a child, the fruit of that affection, and finishes with introducing the seductive adulterer coming to disturb all this happiness, and to destroy the blessings which he describes. He exhibits the defendant coming with all the rashness and impetuosity of youth, careless of the consequences, and thinking of nothing but how he could enjoy his own lustful appetite, at the expense of another man's honor; while the unhappy husband is represented as watching with anxiety over his beloved wife, anxious to secure her affections, and on his guard to preserve her virtue. Gentlemen, if such a case, or any thing resembling it, is established, I shall leave the defendant to whatever measure of damages you choose in your resentment to inflict.

In order, therefore, to examine this matter (and I shall support every syllable that I utter with the most precise and uncontrovertible proofs), I will begin with drawing up the curtains of this blessed marriage-bed, whose joys are supposed to have

been nipped in the bud by the defendant's adulterous seduction.

Nothing, certainly, is more delightful to the human fancy than the possession of a beautiful woman in the prime of health and youthful passion; it is, beyond all doubt, the highest enjoyment which God in his benevolence, and for the wisest purposes, has bestowed upon his own image. I reverence, as I ought, that mysterious union of mind and body, which, while it continues our species, is the source of all our affections—which builds up and dignifies the condition of human life—which binds the husband to the wife by ties more indissoluble than laws can possibly create—and which, by the reciprocal endearments arising from a mutual passion, a mutual interest, and a mutual honor, lays the foundation of that parental affection which dies in the brutes, with the necessities of nature, but which reflects back again upon the human parents the unspeakable sympathies of their offspring, and all the sweet, delightful relations of social existence. While the curtains, therefore, are yet closed upon this bridal scene, your imaginations will naturally represent to you this charming woman endeavoring to conceal sensations which modesty forbids the sex, however enamored, too openly to reveal, wishing, beyond adequate expression, what she must not

even attempt to express, and seemingly resisting what she burns to enjoy.

Alas! gentlemen, you must now prepare to see, in the room of this, a scene of horror, and of sorrow—you must prepare to see a noble lady, whose birth surely required no further illustration, who had been courted to marriage before she ever heard even her husband's name, and whose affections were irretrievably bestowed upon, and pledged to my honorable and unfortunate client—you must behold her given up to the plaintiff by the infatuation of parents, and stretched upon this bridal bed as upon a rack; torn from the arms of a beloved and impassioned youth, himself of noble birth, only to secure the honors of a higher title, a legal victim on the altar of heraldry.

Gentlemen, this is no high coloring for the purpose of a cause. No words of an advocate can go beyond the plain, unadorned effect of the evidence. I will prove to you that when she prepared to retire to her chamber she threw her desponding arms around the neck of her confidential attendant, and wept upon her as a criminal preparing for execution. I will prove to you that she met her bridegroom with sighs and tears—the sighs and tears of afflicted love for Mr. Bingham, and of rooted aversion to her husband. I think I almost hear her addressing him in the language of the poet,

"I tell thee, Howard,
Such hearts as ours were never pair'd above :
Ill suited to each other ; join'd, not matched ;
Some sullen influence, a foe to both,
Has wrought this fatal marriage to undo us.
Mark but the frame and temper of our minds,
How very much we differ. Ev'n this day,
That fills thee with such ecstasy and transport,
To me brings nothing that should make me bless it,
To think it better than the day before,
Or any other in the course of time,
That duly took its turn, and was forgotten."

Gentlemen, this was not the sudden burst of youthful disappointment, but the fixed and settled habit of a mind deserving of a happier fate. I shall prove that she frequently spent her nights upon a couch, in her own apartments, dissolved in tears; that she frequently declared to her woman that she would rather go to Newgate than to Mr. Howard's bed; and it will appear, by his own confession, that for months subsequent to the marriage she obstinately refused him the privileges of a husband.

To all this it will be said by the plaintiff's counsel (as it has indeed been hinted already), that disgust and alienation from her husband could not but be expected, but that it arose from her affection for Mr. Bingham. Be it so, gentlemen. I readily admit that if Mr. Bingham's acquaintance with the lady had commenced subsequent to the marriage, the argument would be irresistible, and the criminal conclusion against him unanswerable;

but has Mr. Howard a right to instruct his counsel to charge my honorable client with seduction, when he himself was the seducer? My learned friend deprecates the power of what he terms my pathetic eloquence. Alas! gentlemen, if I possessed it, the occasion forbids its exertion, because Mr. Bingham has only to defend himself, and can not demand damages from Mr. Howard for depriving him of what was his by a title superior to any law which man has a moral right to make. Mr. Howard was never married. God and nature forbid the banns of such a marriage. If, therefore, Mr. Bingham this day could have, by me, addressed to you his wrongs in the character of a plaintiff demanding reparation, what damages might I not have asked for him; and, without the aid of this imputed eloquence, what damages might I not have expected.

I would have brought before you a noble youth, who had fixed his affections upon one of the most beautiful of her sex, and who enjoyed hers in return. I would have shown you their suitable condition; I would have painted the expectation of an honorable union, and would have concluded by showing her to you in the arms of another, by the legal prostitution of parental choice in the teeth of affection, with child by a rival, and only reclaimed at last, after so cruel and so afflicting a divorce, with her freshest charms despoiled, and

her very morals in a manner impeached, by asserting the purity and virtue of her original and spotless choice. Good God! imagine my client to be plaintiff, and what damages are you not prepared to give him? And yet he is here as defendant, and damages are demanded against him. Oh, monstrous conclusion!

Gentlemen, considering my client as perfectly safe, under these circumstances, I may spare a moment to render this cause beneficial to the public. It involves in it an awful lesson; and more instructive lessons are taught in courts of justice than the church is able to inculcate. Morals come in the cold abstract from pulpits; but men smart under them practically when we lawyers are the preachers.

Let the aristocracy of England, which trembles so much for itself, take heed to its own security—let the nobles of England, if they mean to preserve that pre-eminence which, in some shape or other, must exist in every social community, take care to support it by aiming at that which is creative, and alone creative, of real superiority. Instead of matching themselves to supply wealth to be again idly squandered in debauching excesses, or to round the quarters of a family shield; instead of continuing their names and honors in cold and alienated embraces, amidst the enervating rounds of shallow dissipation, let them live as their

fathers of old lived before them; let them marry as affection and prudence lead the way, and in the ardors of mutual love, and in the simplicities of rural life, let them lay the foundation of a vigorous race of men, firm in their bodies and moral from early habits; and instead of wasting their fortunes and their strength in the tasteless circles of debauchery, let them light up their magnificent and hospitable halls to the gentry and peasantry of the country, extending the consolations of wealth and influence to the poor. Let them but do this, and instead of those dangerous and distracted divisions between the different ranks of life, and those jealousies of the multitude so often blindly painted as big with destruction, we should see our country as one large and harmonious family, which can never be accomplished amidst vice and corruption, by wars or treaties, by informations *ex officio* for libels, or by any of the tricks and artifices of the state; would to God this system had been followed in the instance before us! Surely, the noble house of Fauconberg needed no further illustration, nor the still nobler house of Howard, with blood enough to have inoculated half the kingdom. I desire to be understood to make these observations as general moral reflections, and not personally to the families in question—least of all to the noble house of Norfolk, the head of which is now present; since no man, in my opinion, has more at

heart the liberty of the subject, and the honor of our country.

Having shown the feeble expectation of happiness from this marriage, the next point to be considered is this : Did Mr. Bingham take advantage of that circumstance to increase the disunion ? I answer, No. I will prove to you that he conducted himself with a moderation and restraint, and with a command over his passions, which I did not expect to find, and which in young men is not to be expected. I shall prove to you by Mr. Greville, that on this marriage taking place with the betrothed object of his affections, he went away a desponding man; his health declined; he retired into the country to restore it; and it will appear that for months afterwards he never saw this lady, until by mere accident he met her; and then, so far was he from endeavoring to renew his connection with her, that she came home in tears, and said he frowned at her as she passed; this I shall prove to you by the evidence in the cause.

Gentlemen, that is not all. It will appear that when he returned to town he took no manner of notice of her, and that her unhappiness was beyond all power of expression. How, indeed, could it be otherwise after the account I have given you of the marriage? I shall prove, besides, by a gentleman who married one of the

daughters of a person to whom this country is deeply indebted for his eminent and meritorious service (Marquis Cornwallis), that from her utter reluctance to her husband, although in every respect honorable and correct in his manners and behavior, he was not allowed even the privileges of a husband for months after the marriage. This I mentioned to you before, and only now repeat it in the statement of the proofs. Nothing better, indeed, could be expected. Who can control the will of a mis-matched, disappointed woman? Who can restrain or direct her passions? I beg leave to assure Mr. Howard (and I hope he will believe me when I say it), that I think his conduct toward this lady was just such as might have been expected from a husband who saw himself to be the object of disgust to the woman he had chosen for his wife; and it is with this view only that I shall call a gentleman to say how Mr. Howard spoke of this supposed, but, in my mind, impossible object of his adoration. How, indeed, is it possible to adore a woman when you know her affections are riveted to another? It is unnatural! A man may have that appetite which is common to the brutes, and too indelicate to be described; but he can never retain an affection which is returned with detestation. Lady Elizabeth, I understand, was, at one time, going in a phaeton: "There she goes," said Mr. Howard, "God damn

her. I wish she may break her neck. I should take care how I got another." This may seem unfeeling behavior, but in Mr. Howard's situation, gentlemen, it was the most natural thing in the world, for they cordially hated one another. At last, however, the period arrived when the scene of discord became insupportable, and nothing could exceed the generosity and manly feeling of the noble person (the Duke of Norfolk) whose name I have been obliged to use in the course of this cause, in his interference to effect that separation which is falsely imputed to Mr. Bingham. He felt so much commiseration for this unhappy lady, that he wrote to her in the most affecting style. I believe I have got a letter from his grace to Lady Elizabeth, dated Sunderland, July the 27th, that is, three days after their separation, but before he knew it had actually taken place. It was written in consequence of one received from Mr. Howard upon the subject. Among other things, he says, "I sincerely feel for you." Now, if the Duke had not known at that time that Mr. Bingham had her earliest and legitimate affections, she could not have been an object of that pity which she received. She was, indeed, an object of the sincerest pity, and the sum and substance of this mighty seduction will turn out to be no more than this: that she was affectionately received by Mr. Bingham after the final period of

voluntary separation. At four o'clock this miserable couple had parted by consent, and the chaise was not ordered till she might be considered as a single woman by the abandonment of her husband. Had the separation been legal and formal, I should have applied to his lordship, upon the most unquestionable authorities, to nonsuit the plaintiff; for this action being founded upon the loss of the wife's society, it must necessarily fall to the ground if it appears that the society, though not the marriage union, was interrupted by a previous act of his own. In that hour of separation I am persuaded he never considered Mr. Bingham as an object of resentment or reproach. He was the author of his own misfortunes, and I can conceive him to have exclaimed, in the language of the poet, as they parted,

“ ——— Elizabeth never lov'd me.

Let no man, after me, a woman wed
Whose heart he knows he has not; though she brings
A mine of gold, a kingdom for her dowry.
For let her seem, like the night's shadowy queen,
Cold and contemplative, he can not trust her:
She may, she will, bring shame and sorrow on him;
The worst of sorrows, and the worst of shames!”

You have, therefore, before you, gentlemen, two young men of fashion, both of noble families, and in the flower of youth. The proceedings, though not collusive, can not possibly be vindictive; they are indispensably preliminary to the dissolution of

an inauspicious marriage, which never should have existed. Mr. Howard may then profit by an useful, though an unpleasant experience, and be happier with a woman whose mind he may find disengaged; whilst the parents of the rising generation, taking warning from the lesson which the business of the day so forcibly teaches, may avert from their families, and the public, that bitterness of disunion, which, while human nature continues to be itself, will ever be produced to the end of time, from similar conjunctures.

Gentlemen, I have endeavored so to conduct this cause as to offend no man. I have guarded against every expression which could inflict unnecessary pain; and, in doing so, I know that I have not only served my client's interests, but truly represented his honorable and manly disposition. As the case before you cannot be considered by any reasonable man as an occasion for damages, I might here properly conclude; yet, that I may omit nothing which might apply to any possible view of the subject, I will conclude with reminding you that my client is a member of a numerous family; that, though Lord Lucan's fortune is considerable, his rank calls for a corresponding equipage and expense. He has other children; one already married to an illustrious nobleman, and another yet to be married to some man, who must be happy indeed if he shall know

her value. Mr. Bingham, therefore, is a man of fortune; but the heir only of, I trust, a very distant expectation. Under all these circumstances, it is but fair to believe that Mr. Howard comes here for the reasons I have assigned, and not to take money out of the pocket of Mr. Bingham to put into his own. You will, therefore, consider, gentlemen, whether it would be creditable for you to offer what it would be disgraceful for Mr. Howard to receive.

MORTON AGAINST FENN.

SPEECH IN THE COURT OF KING'S BENCH

AGAINST A NEW TRIAL.

The case of *Morton vs. Fenn* grew out of a breach of promise of marriage made by the defendant Fenn to one Mrs. Morton, a poor widow woman, whom he had employed in the capacity of housekeeper. Under promise of marriage, the defendant, an old, infirm man, had induced Mrs. Morton to cohabit with him, and had afterwards refused to marry her, thus laying the foundation of an action to recover damages.

But little record of the trial was preserved, though it appears that after the case had been opened for the plaintiff, the Attorney-General, Mr. Wallace, endeavored to laugh the case out of court, by showing that neither party had sustained any loss through breach of the marriage contract, since the plaintiff was an old woman, remarkable for any thing but beauty, and the defendant, whom he pointed out to the jury, was a person whose loss as a husband would be amply compensated by a farthing damages. Notwithstanding these efforts at defeating the case by weapons of ridicule, the jury found a verdict of two thousand pounds. In the succeeding term the Attorney-General obtained a rule for setting aside the verdict, and for a new trial, on the ground of excessive damages. Mr. Erskine showed cause against the rule in the following speech, contending that the court had no jurisdiction, in such a case, to impeach the verdict, and that the plaintiff was entitled to the full amount.

MR. ERSKINE'S SPEECH.

MY LORD: The jurisdiction exercised by the court in cases of excessive damages stands upon so sensible and so clear a principle, that the bare stating of it must, in itself, be an answer to the rule for a new trial which the defendant has obtained.

In cases of pecuniary contracts, the damage is matter of visible and certain calculation; the court can estimate it as well as the jury; and though it never interferes, on account of those variations, which may be fairly supposed to have arisen from the different degrees of credit given to the evidence, yet where the jury steps beyond every possible estimate of the injury arising from the contract broken, the court must say that the verdict is wrong; because it is a subject upon which there can be no difference of judgment amongst reasonable men; the advantage of a pecuniary contract, and, consequently, the loss following from the breach of it, being a matter of dry calculation. In such cases, therefore, the court does not set up a jurisdiction over damages in violation, or control, of the constitutional rights of juries, but only prevents the operation of either a visible, certain, palpable mistake, or a willful act of injustice. This

is the whole ; and without such power in the court, since attaints have gone into disuse, the constitution would be wretchedly defective.

The same principles apply, likewise, to all actions of tort founded on injuries to property ; the measure of damages in such actions being equally certain. As much as the plaintiff's property is diminished in value by the act of the defendant, so much shall the defendant pay ; for he must place the plaintiff in the same condition as if the wrong had not been committed ; in such discussions there must be likewise many shades of difference in the judgments of men respecting the loss and inconvenience suffered by acts injurious to property, and as far as these differences can have any reasonable operation, juries have an uncontrolled jurisdiction ; as the court will never set aside their verdict for a difference which might fairly subsist upon the evidence between intelligent and unprejudiced men ; but here, too, when they go beyond the utmost limits of discreet judgment, the court interferes, because there is in all cases of injury to property a pecuniary calculation to govern the jurisdiction it exercises ; all attacks on property resolving themselves into pecuniary loss, pecuniary damages are easily adjusted.

But there is a catalogue of wrongs over which juries, where neither favor nor corruption can be alleged against them, ought to have an uncon-

trolled dominion; not because the court has not the same superintending jurisdiction in these as in other cases, but because it can rarely have any standard by which to correct the error of the verdict.

There are other rights which society is instituted to protect as well as the right of property, which are much more valuable than property, and for the deprivation of which no adequate compensation in money can be made. What court, for instance, shall say in an action for slandering an honest and virtuous character, that a jury has overrated the wrong which honor and sensibility endure at the very shadow of reproach? If a wife is seduced by the adulterer from her husband, or a daughter from the protection of her father, can the court say this or that sum of money is too much for villainy to pay, or for misery to receive? In neither of these instances can the jury compel the defendant to make an adequate atonement, for neither honor nor happiness can be estimated in gold; and the law has only recourse to pecuniary compensation from the want of power to make the sufferer any other.

These principles apply in a strong degree to the case before the court. It is, indeed, a suit for breach of a contract, but not a pecuniary contract; injury to property is an ingredient, but not the sole ingredient of the action; there is much personal

wrong, and of a sort that is irreparable; there is, upon the evidence reported by your lordship, loss of health, loss of happiness, loss of protection from relations and friends, loss of honor which had been before maintained (in itself the full measure of ruin to a woman); and, added to all these, there is a loss of property in the disappointment of a permanent settlement for life; and for all this the jury have given two thousand pounds, not more than a year's interest of the defendant's property.

I am, therefore, at a loss to discover any circumstance on the face of your lordship's report, from which, alone, the court must judge of the evidence, that can warrant a judgment that the jury have done wrong; for, independent of their exclusive right to settle the degrees of credit due to the witnesses, what was there at the trial, or what is there now, to bring their credit into question? Their characters stood before the jury, and stand before the court, unimpeached; and Mr. Wallace's whole argument, if, indeed, jest is to be considered as reason, hangs upon the inadmissible supposition that the witnesses exaggerate the case; but the jury have decided on their veracity, and, therefore, before the court can grant a new trial, it must say that the verdict is excessive and illegal upon the facts as reported by your lordship, taking them to be literally as they proceeded from the mouths of the witnesses. Upon this state of the

case, and it is impossible to remove me from it, I think it is not very difficult to make up the defendant's bill for two thousand pounds.

The plaintiff appears to be the daughter of a clergyman, and to have been bred up with the notions of a gentlewoman; she had been before respectably married, in which condition, and during her widowhood, she had preserved her character, and had been protected and respected by her relations and friends. It is probable that her circumstances were very low, from the character in which she was introduced to the defendant, who, being an old and infirm man, was desirous of some elderly person as a housekeeper; and no imputation can justly be cast upon the plaintiff for consenting to such an introduction; for, by Mr. Wallace's favor, the jury had a view of this defendant, and the very sight of him rebutted every suspicion that could possibly fall upon a woman of any age, constitution, or complexion. I am sure every body who was in court must agree with me that all the diseases catalogued in the dispensatory seemed to be running a race for his life, though the asthma appeared to have completely distanced his competitors, as the fellow was blowing like a smith's bellows the whole time of the trial. His teeth being all gone, I shall say nothing of his gums; and as to his shape, to be sure a bass-fiddle's perfect gentility compared with it. I was sur-

prised, therefore, that Mr. Wallace should be the first to point out this mummy to the jury, and to comment on his imperfections, because they proved to a demonstration that the plaintiff could have no other possible inducement or temptation to cohabit with him, but that express and solemn promise of marriage, which was the foundation of the action, and the aggravation of the wrong. But, besides such plain presumption, it is directly in proof that she never did cohabit with him before, nor until under this express promise and condition; so that the whole argument is, that disease and infirmity are excuses for villainy, and extinction of vigor an apology for debauchery. The age of the plaintiff, who is a woman toward fifty, was another topic; so that a crime is argued to be less in proportion as the temptation to commit it is diminished.

It would be in the defendant's favor if the promise had been improvident and thoughtless, suddenly given, and as suddenly repented; but the very reverse is in evidence, as she lived with him on these terms for several months, and at the end of them, he repeated his promises, and expressed the fullest approbation of her conduct. It is further in proof, that she fell into bad health on her discovering the imposition practiced on her, and his disposition to abandon her. He himself admitted her vexation on that account to be the cause of her illness, and his behavior under that

impression was base. Having determined to get rid of her, he smuggled her out of his own house to her sister's, under pretence that change of air would recover her; and continued to amuse the poor creature with fresh promises and protestations, till, without provocation, and without notice or apology, he married another woman, young enough to be his daughter, and who, I hope, will manifest her affection by furnishing him with a pair of horns sufficient to defend himself against the sheriff when he comes to levy the money upon this verdict.

By this marriage, the poor woman is abandoned to poverty and disgrace, cut off from the society of her relations and friends, and shut out from every prospect of a future settlement in life suitable to her education and her birth; for having neither beauty nor youth to recommend her, she could have no pretensions but in that good conduct and discretion which, by trusting to the honor of the defendant, she has forfeited and lost.

On all these circumstances, no doubt, the jury calculated the damages, and how can your lordship unravel or impeach the calculation? They are not like the items in a tradesman's account, or the entries in a banker's book. It is,

For loss of character, so much;

For loss of health, so much;

For loss of the society and protection of relations and friends, so much ;

And for the loss of a settlement for life, so much.

How is the court to audit this account so as to say that, in every possible state of it, the jury has done wrong? How, my lord, are my observations, weak as they are as proceeding from me, but strong as supported by the subject, to be answered? Only by ridicule which the facts do not furnish, and at which even folly, when coupled with humanity or justice, can not smile. We are, besides, not in a theatre, but in a court of law ; and when judges are to draw grave conclusions from facts which, not being under re-examination, can not be distorted by observation, they will hardly be turned aside from justice by a jest.

I, therefore, claim for the plaintiff the damages which the jury gave her under these directions from your lordship, " That they were so entirely within their province, that you would not lead their judgments by a single observation."

Trial of WILLIAM CODLING, JOHN REID, WILLIAM MACFARLANE, and GEORGE EASTERBY, for destroying the Brig Adventure on the High Seas, within the jurisdiction of the Admiralty of England.

STATEMENT.

This was an indictment preferred against William Codling and John Reid, the former as master, and the latter as an officer of the brig Adventure, for the destruction of the vessel, with a view to obtaining the insurance upon her. The indictment charged the commission of the act by boring holes in the bottom of the vessel, thus causing her to be cast away to the prejudice of the underwriters. Macfarlane and Easterby, two London merchants, owners of the Adventure, were charged, in the nature of accessories before the fact, with having procured the destruction of the ship, their conduct and conversations before and after the sinking of the vessel being relied upon in support of the charge.

The cause came on to be tried at a session of Oyer and Terminer, held at the Old Bailey, October 26th, 1802, before Sir William Scott, Judge of the High Court of Admiralty, Lord Ellenborough, Chief Justice of the King's Bench, and Sir Alexander Thomson, a baron of the Exchequer. Mr. Erskine appeared as counsel for the prisoner Easterby only. The evidence for the prosecution being closed, and the counsel for the other prisoners having spoken, Mr. Erskine addressed the court, insisting that a sufficient case had not been made out to bring his client within the jurisdiction of the Court of Admiralty, and that he could not, therefore, be put upon his defence.

. . .

SPEECH OF MR. ERSKINE,

IN BEHALF OF

GEORGE EASTERBY.

MY LORDS: The evidence on the part of the Crown being now closed, I rise on the part of the prisoner Easterby, for whom alone I am counsel, to submit to your lordships that no evidence whatever has been given to bring him within the jurisdiction of the Court of Admiralty, and that he can not, therefore, be called upon for any defence.

I agree with your lordships in the answer already given to the objection taken by my friend, Mr. Fielding—fitly and ably taken by him, under the different situation of his client. It was the only objection which he could possibly interpose; and, had I stood in his situation, I should therefore have endeavored to maintain it, as it was equally open to the prisoner Easterby; but I forebore altogether from insisting upon it, because, having no confidence in it, and having other objections which deserve the greatest attention, I was very little disposed to lose any part of the credit I may have with the court by beginning with an objec-

tion not supported in my own judgment, and only forced upon my learned friend, Mr. Fielding, from necessity, a necessity, fortunately for the prisoner Easterby, not applicable to him.

I admit, that if there be any evidence, however unfit and unlikely to be acted upon by the jury, which yet, if believed, would remove me from the point of law, as an abstract consideration, that my mouth must be closed. I admit that it is not open to me at all to discuss how much or how little may be inferred from circumstances against the prisoner, provided the court has jurisdiction to consider them, and, therefore, I confess that I felt during the whole progress of the proof a considerable degree of anxiety, because if there had been any evidence whatever that Easterby had ever been on board of the *Adventure*, it must have been left to the jury, upon the whole evidence, what share he had in the acts imputed to the owners, and whether his participation and assent had existed upon the sea; but of this fact there is not only no direct proof, but nothing from whence the court can be warranted in law to direct or advise the jury to find it; and therefore I stand precisely in the same situation as if in a civil case I were calling upon your lordships to nonsuit a plaintiff who had given no evidence, whatever, to maintain his suit.

My argument, my lords, resolves itself shortly into this proposition :

That by the constitution of the High Court of Admiralty, as it is fixed by the general law, it can take no cognizance of a felony committed upon the land ; and that the particular act of Parliament on which the prisoners are indicted, which created the offence and directed the mode of punishment, has not enlarged its jurisdiction ; the framers of it might most probably have intended it, but they have not done it. I am aware of the general feelings of the public when the law is found unequal to reach great offenders, but the wise and thinking part of mankind need not be reminded, at this time of day, that if a defective law could, therefore, be overleaped to reach them, the same principle would extend, also, to overleap all the barriers which our free government has set up for the protection of the subject against arbitrary discretion and power. It is also too late in the day to attempt to depreciate the argument I have presently to offer you, by critical discussion upon the nature of local jurisdictions ; whether they were originally wise or necessary, and whether they are not useless and even embarrassing to justice in the present state of things, I leave to the historian, the commentator, or the student ; my business is with what the law beyond all question was, and is, and not why it was and is so. One thing, however, I

will say, because it may give pause to rash thinkers on such subjects, that local jurisdictions were inseparable from the very nature of the feudal constitutions of our earliest ancestors, which are the root and foundation of our present free and firm government, and in my opinion the main reason that it has continued to be firm and free amidst the revolutions that have shaken and are still shaking the earth.

Feudal jurisdictions were in their very nature local, and so completely feudal was the whole judicial system of Great Britain, that though for ages before the reign of King Henry VIII., she had been naval and commercial, a circumstance which could not but have produced, in innumerable instances, a great defect of justice from her judges and juries being unable to extend their authorities beyond the limits of the island; yet there never was even an attempt or a thought before that period to draw to the cognizance of the English laws the crimes even of English subjects, when committed upon the seas, or out of the realm of England; the crimes, however heinous, did not even range themselves in the catalogue of offences, and could only be tried according to the course of the civil law. To avoid these many inconveniences, the statute of Henry VIII. erected the Court of Admiralty, but not by confounding ancient distinctions; the remedy was merely statutable, altering no

landmarks, abrogating no ancient rules or analogies, and confined to the strict enacting letter; a position clearly established from the whole course and series of the statutes on the subject down to the present times.

The statute of Henry VIII., after reciting in its preamble that pirates, thieves, murderers, and robbers upon the sea had frequently gone unpunished, because the trial of such offenders had been before the lord admiral, according to the course of the civil law, gives authority to the King to direct his commission to the lord admiral, the lord chancellor, and others, who might inquire of such offences by a jury of the shire named in the commission, as if the offences had been committed within such shires. But so cautiously and circumspectly did the legislature proceed, that it only gave this new forum of trial, without altering the nature or punishment of the offences; not even creating them felonies, so as to surround them with all the consequences and analogies of British justice. This may appear, at first view, strange and singular, but it is not at all so when the general law at that time, with regard to the locality of trial, is considered.

At the time the statute of Henry VIII. was made, if part of a felony had been committed in one county, and part, or rather the consequences of the felonious act, had become consummated in

another, the trial could proceed in neither. As, if a man had received a mortal stroke in one county, and then had crossed a brook into another, and there died, though so near that you might touch him, it is perfectly notorious that till, by the provisions of a subsequent statute, there was a total failure of justice.

There was also a similar defect with regard to principal and accessory. If a man, having been accessory to a felony in one county, but the felony had afterwards been committed in another, or if, after a felony committed in one county there had been an accessory after the fact in another, in neither of the cases could the accessory be tried; because the guilt of an accessory depending upon the consummation of the offence by the principal, he could not be convicted till the felony was established; and by the law, as it then stood, the authority of juries to inquire, being absolutely confined to their particular counties, they could not find the fact upon any evidence if beyond the limits of their shire; and thus, in all cases of accessories, unless where the felony happened to be hatched and consummated in the same county, there was a total failure of justice.

In the earlier ages, when society was in a less civilized and commercial state, these cases had probably occurred less frequently. Men went seldom to a distance, and defects in the locality of

feudal trial had not grown to such a magnitude as to induce Parliament to break in upon the grand principles of feudal jurisdiction, which was a species of domestic tribunal, where men, judging and judged, and the witnesses also, were known to and connected with one another.

The elements of social and civil life, my lords, are awful considerations, and must not be suddenly or rudely departed from, but must be changed insensibly as society insensibly extends and changes.

I take for granted that I shall not be called upon for authorities to maintain these positions, when the statute of the 2d and 3d of Edward VI. solemnly declares them, and acts upon them. Statutes, indeed, frequently recite that doubts had arisen where the doubts were unfounded, and remove them in future by legislative provisions declaratory of the ancient law ; but this act of Edward VI. holds quite a different language. It is a history of the law ; it recites its origin and its defects, and provides a remedy, but a statutable remedy, limited, of course, by the enacting letter of the law. I desire the attention of the court whilst I read this preamble, because it is absolutely conclusive of the subject before you. The defect of jurisdiction which you must to-day submit to in only this single instance, and which Parliament will undoubtedly put an end to in the hour it assembles, is a defect in the execution of a single

statute only, and of modern date ; whereas the defect remedied by the statute of Edward VI. had existed for ages in innumerable instances, and was a total defect of justice, not in cases of crimes upon the high seas, but in the very heart of the kingdom, and in every case of felony where the invisible, unsubstantial boundaries of counties divided the felonious act from its consequence, or the machination of guilt from the accomplishment.

The act in its preamble recites that it often happeneth "in sundry counties of this realm, that a man is feloniously stricken in one county, and after dieth in another county, in which case it hath not been founden by the laws or customs of this realm that any sufficient indictment thereof can be taken in any of the said two counties, for that by the custom of this realm the jurors of the county where such party died of such stroke can take no knowledge of the said stroke, being in a foreign county, although the same two counties and places adjoin very near together, and the jurors of the county where the stroke was given can not take knowledge of the death in another county, although such death most apparently come of the same stroke ; so that the King's Majesty within his own realm can not, by any laws yet made or known, punish such murderers or manquellers for offences in this form committed and done ; nor any appeal at some time may lie for the same, but

doth also fail, and the said murderers and man-quellers escape thereof without punishment, as well in cases where the counties where such offences be committed and done may join, as otherwise where they may not join.

“And also it is a common practice amongst errant thieves and robbers, in this realm, that after they have robbed or stolen in one county, they will convey their spoil, or part thereof, so robbed or stolen, unto some of their adherents into some other county, where the principal offence was not committed or done, who, knowing of such felony, willingly and by false covin receiveth the same; in which case, although the principal felon be after attainted in one county, the accessory escapeth by reason that he was accessory in another county, and that the jurors of the said other county, by any law yet made, can take no knowledge of the principal felony nor attainder in the first county, and so such accessories escape thereof unpunished, and do often put in use the same, knowing that they may escape without punishment.”

Your lordships may observe that there is a studied attention in the judicious framers of this act to point out, in the strongest colors, the defects in the law intended to be remedied; not only to preserve the legal history of the country, but to manifest that it is not upon light occasions that the statutes of England interfere with ancient

customs and jurisdiction ; for the common law is a venerable and harmonious system, not to be rashly touched, and above all by the makers of laws, who are ignorant of its universal principle and structure. The preamble of the statute is therefore a clear and precise history of the law in the part to be affected by the proposed remedy ; and the enacting part accordingly directed that in future the trial should proceed as if the felonious stroke and death were in one and the same county, and that upon the trial of the accessory where the principal felony was in another county, the justices should send to the *custos rotulorum* to certify the conviction of the principal, and then the trial should proceed against the accessory in the county where his offence was committed. Thus the locality of jurisdiction was studiously preserved, and nothing altered, except where it was necessary to remedy a defect of justice by bringing anomalous cases within the reach of the laws.

It is necessary to pause here a moment, in order to see distinctly the state of jurisdiction at this period.

Before the statute of Henry VIII., crimes committed on the high seas could not be inquired of at all by a jury, but only before the admiral or his lieutenant, according to the course of the civil law ; that statute, without at all changing or affecting the quality of the offences, enabled the King to

grant his commission to the lord admiral and others for their trial by a jury, as if the said offences had been committed upon the land. And in the succeeding reign the locality of jurisdiction existed with all the rigor and strictness which appears so strikingly in the act of King Edward VI.

The common law jurisdictions existed, therefore, in their original conditions, except as altered by the enacting letter of these two statutes, and the Admiralty Court could hold no jurisdiction under the act of Henry VIII., unless where the offence was committed on the high seas, or in creeks and havens of the sea.

It did not occur to the legislature at this time that cases might arise in which an accessory upon the land might procure a murder, or piracy, or other felony, or crime to be committed upon the sea, for otherwise the statute of Henry VIII. would most unquestionably have extended to that necessary and seemingly obvious provision; because, nine times out of ten, crimes of this description take their birth from conspiracies upon the land. The evil of this omission was soon felt in many cases, and accessories upon the land to offences on the sea escaped without punishment. Lord Hale, who wrote in the time of Charles II., near one hundred and fifty years after the passage of the act of Henry VIII., expressly

says, in his Pleas of the Crown, that there was no law to reach such offenders, and the defect continued until it was remedied in part by Parliament in the reign of King William; the defect had existed in all the intermediate time, and had been grievously felt, and solemnly recorded in the books of the law, yet the judges never thought of extending the existing statutes, by construction, or rather, indeed, of making law by their own authority to reach the omitted cases; the legislature alone could apply the remedy, and it was applied accordingly, though very defectively, by the statute 11th and 12th of William III., Chap. 7.

This statute, after reciting that evil disposed persons had set forth pirates from the land, and that from defects in the laws they could not be brought to condign punishment, enacts, that any person who should, either on the land, or upon the seas, set forth any pirate to commit piracies or robberies on the seas, or should receive or conceal such robbers, or take into their custody any thing piratically or feloniously taken by them, should be adjudged to be accessories, and be tried according to the statute of King Henry VIII.

This is the first time that Parliament adverted to a case so probable, and both before and afterwards so common, as that persons on the land should, before or after the fact, be accessories to crimes committed upon the seas. It is most

strange and unaccountable, that though the very case was now before them, and though they were providing so necessary and long-wanted a remedy, they should stop short of their object, and confine their remedy to accessories, to piracies and robberies only, leaving out murder, though murderers were expressly within the letter of the statute of Henry VIII., and it was not till the reign of George II. that this defect was remedied; and although it existed during so long a period, no court or judge ever conceived that it was possible to cure it by judicial authority; and to show how completely these jurisdictions are creatures of the statute laws, and how impossible it is to extend them by analogy, or to judge of the intention of the legislature, except by the letter of statutes, when Parliament at last interfered to remedy the defect, which was cured as to piracy and robbery by the statute of King William, but which still remained as to murder, when the mortal stroke or poisoning was on the land, and the death on the sea, or *e converso*, it did not give the jurisdiction to the admiralty in either of these cases; but, in direct opposition to the statute of King William, directed that the indictments and trials against both principals and accessories, in all such cases, should be taken before the justices of Gaol Delivery, or of Oyer and Terminer, in the same manner as if the whole of the offences were committed

upon the land. As this important statute is very short, I will read it :

Second Geo. II., Chap. 21.—“An act for the trial of murders, in cases where either the stroke or death only happens within that part of Great Britain called England.

“ For preventing any failure of justice, and taking away all doubts touching the trial of murders, in the cases hereinafter mentioned, be it enacted, by the King’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that where any person, at any time after the 24th day of June, in the year of our Lord 1729, shall be feloniously stricken or poisoned upon the sea, or at any place out of that part of the kingdom of Great Britain called England, or where any person, at any time after the 24th day of June, in the year of our Lord 1729, shall be feloniously stricken or poisoned at any place within that part of Great Britain called England, and shall die of the same stroke or poisoning upon the sea, or at any place out of that part of the kingdom of Great Britain called England ; in either of the said cases, an indictment thereof, found by the jurors of the county in that part of the kingdom of Great Britain called England, in which such death, stroke, or poisoning shall happen, respectively as aforesaid, whether it

shall be found before the coroner upon the view of such dead body, or before the justices of the peace, or other justices, or commissioners, who shall have authority to inquire of murders, shall be as good and effectual in the law, as well against the principals in any such murder, as the accessories thereunto, as if such felonious stroke, and death thereby ensuing, or poisoning, and death thereby ensuing, and the offence of such accessories, had happened in the same county where such indictment shall be found; and that the justices of Gaol Delivery and Oyer and Terminer, in the same county where such indictment shall be found, and also any superior court, in case such indictment shall be removed into such superior court, shall and may proceed upon the same in all points, as well against the principals in any such murder, as the accessories thereto, as they might, or ought to do, in case such felonious stroke, and death thereby ensuing, or poisoning, and death thereby ensuing, and the offence of such accessories, had happened in the same county where such indictment shall be found; and that every such offender, as well principal as accessory, shall answer upon their arraignments, and have the like defences, advantages, and exceptions, except challenges for the hundred, and shall receive the like trial, judgment, order, and execution, and suffer such forfeitures, pains, and penalties as they ought to do if such felonious stroke, and

death thereby ensuing, or poisoning, and death thereby ensuing, and the offence of such accessories, had happened in the same county where such indictment shall be found."

The application of all these statutes to the case now before the court will appear presently. I have avoided even naming the act upon which my client, Easterby, stands indicted, because it is impossible to deal with it without understanding thoroughly and clearly the jurisdictions of the kingdom by which its interpretation must be governed. The application, then, of all these statutes, and from which I do not merely argue, but venture to pronounce positively, even from this place, that nothing can legally remove me, is, shortly and plainly, this: that the Admiralty Court has no original jurisdiction of the kind now executing with the assistance of a jury, by the ancient laws and customs of this realm, over any crime whatsoever; that it stands wholly for its authority upon the statute law; that the act of Henry VIII. confined its jurisdiction, under a commission like the present, to offences committed upon the sea, or its havens; that where the crime was committed partly on the land and partly on the sea, either as to principals or accessories, this statute gave no jurisdiction; that the defects were remedied as they occurred to the legislature, and that so far were any original or remaining defects

of a nature to be cured by analogies and judicial constructions, Parliament itself adopted directly opposite jurisdictions, as to the different crimes, as if it were to show that the remedies were statutable, and were to be drawn into no example to disturb the ancient jurisdictions; and, indeed, when it became necessary for Parliament to interfere to prevent a failure of justice, even when the whole crime was committed within the body of the realm, and only broken into imaginary parts by the divisions of counties, it becomes almost indecent and ridiculous to say that judges could advance, without the same warrant to unite the land and the sea, immemorially and naturally separated.

We are now brought to the statute on which the indictment is founded, viz., the 11th of George I., Chap. 29, which creates the offences and provides the jurisdictions for trial. The offences had indeed been created before by an act of the 4th of the same king, in nearly the same words, but so imperfectly and blunderingly worded as to the remedy, that it became necessary for Parliament to pass the law now in question, which, unfortunately, did not much improve upon its imperfect original.

I will first read the whole of it to the court, and afterwards comment upon its defective parts.

“And whereas by an act made in the fourth

year of His Majesty's reign, entitled an act for enforcing and making perpetual an act of the twelfth year of her late majesty, intituled an act for preserving all such ships, and goods thereof, which shall happen to be forced on shore, or stranded on the coast of this Kingdom, or any other of His Majesty's dominions, and for inflicting the punishment of death on such as shall wilfully burn or destroy ships; it is amongst other things enacted, that if any owner of, or captain, master, mariner, or other officer belonging to any ship, shall, after the twenty-fourth day of June which shall be in the year of our Lord one thousand seven hundred and eighteen, wilfully cast away, burn, or otherwise destroy the ship of which he is owner, or unto which he belongs, or in any manner or wise direct or procure the same to be done, to the prejudice of any person or persons that shall underwrite any policy or policies of insurance thereon, or of any merchant or merchants that shall load goods thereon, he shall suffer death.

“And whereas some doubts have arisen, touching the nature of the offence provided against by the said recited act, and the trial and punishment to be had and inflicted for the same. Be it therefore enacted and declared by the authority aforesaid, that if any owner of, or captain, master, officer, or mariner, belonging to any ship or vessel, shall, after the four and twentieth day of June, one

thousand seven hundred and twenty-five, wilfully cast away, burn, or otherwise destroy the ship or vessel of which he is the owner, or to which he belongeth, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons, that hath or shall underwrite any policy or policies of insurance thereon, or of any merchant or merchants that shall load goods thereon, or of any owner or owners of such ship or vessel, the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged a felon or felons, and shall suffer as in cases of felony, without benefit of clergy.

“And be it further enacted, by the authority aforesaid, that if any of the said offences, in wilfully casting away, burning, or otherwise destroying any ship or vessel, as aforesaid, shall be committed within the body of any county of this realm, the same shall and may be inquired of, tried, determined, and adjudged, in the same courts, in such manner and form as felonies done within the body of any county, by the laws of this realm, are to be inquired of, tried, determined, and adjudged; and if any of the said offences shall be committed upon the high seas, the same shall be inquired of, tried, determined, and adjudged, before such court, and in such manner and form as in and by an act made in the eight-and-twentieth year of the reign

of King Henry the Eighth, entitled, for pirates, is directed and appointed, for the inquiring, trying, determining, and adjudging of felonies done upon the high seas."

To that part of the act which creates the offences I take no objection; it is sufficiently clear and explicit. I have only to remark, that though the procurer or accessory is comprehended under the penal letter, he is not declared to be a principal felon. This, however, is not material to my argument, as it will stand upon precisely the same principles, whether the prisoner be considered as the one or the other; but it is always best to take the law as it is, and there can be no doubt upon the subject. The language of Lord Hale is positive. My learned friend, Mr. Sergeant Best, who is counsel for another prisoner, has taken the very words in which he delivers it as law, that unless a statute enacts that a party procuring a felony to be committed shall be deemed and taken to be a principal, he is an accessory only. When a felony is created by statute, he that procures it to be committed becomes an accessory by the general law, without any enacting words; but to make the procurer of a felony a principal felon, he must be so declared by the statute, and Easterby has, therefore, been so considered by the court, from the order in which he was called upon for his defence, otherwise I should, from precedency, have first had

to address your lordships, had all the prisoners been taken to be principals.

All this, however, as I have already said, is immaterial to my argument. It is enough for me that the act charged upon the prisoner Easterby, viz., that being an owner of the brig *Adventure*, he willfully procured her to be cast away, to defraud the underwriters, is, by this act only, and by no other law, created a felony, and, consequently, whether he be an accessory or a principal felon, he is the one or the other solely by the operation of this law; and before I make any verbal criticism upon the last clause, which alone creates any jurisdiction by which these offences can be punished, I wish to prepare your lordships' minds for the defects I mean to impute to it, or rather which it will itself show the moment it is read, when the attention has been previously drawn to the subject.

It is self-evident that it did not occur to the framers of the act, that the offence of the procurer of the destruction of a ship, whether he were to be considered as principal or accessory, might be committed upon the land, though the destruction itself might be, as it most commonly is, upon the sea. The same imperfection belonged to the act of Henry VIII., and which, as I have already shown, was not remedied till the time of King William, and then remedied as to piracies and robberies only, the defect remaining as to acces-

sories on the land, to murders at sea, until the reign of George II. The probability is, that the makers of this general act, passed at the end of a session, and addressing itself to many different objects, as appears by its title, had not adverted to, nor perhaps were acquainted with these statutes, nor of the niceties attending jurisdictions.

The words of the clause, which at once raise and decide the question, are as follows :

“And be it further enacted, that if any of the said offences, in wilfully casting away, burning, or otherwise destroying any ship or vessel, as aforesaid, shall be committed within the body of any county of this realm, the same shall and may be inquired of, tried, determined, and adjudged in the same courts in such manner and form as felonies done within the body of any county by the laws of this realm, are to be inquired of, tried, determined, and adjudged ; and if any of the said offences shall be committed upon the high seas, the same shall be inquired of, etc., etc., before such court, and in such manner and form as is directed by an act made in the twenty-eighth year of Henry VIII., intituled for pirates,” etc., etc.

Your lordships being now in possession of the whole clause, let us attend to its parts.

It begins thus : “And be it enacted, that if any of the said offences, in wilfully casting away, burn-

ing, or otherwise destroying any ship or vessel, as aforesaid ;” and there it stops.

It had, in the antecedent section, made the procuring such destruction to be a felony also ; and yet, though the section now under consideration was expressly made to give a jurisdiction and forum of trial for all the offences created by the statute, it takes no notice whatever of the second class of offenders, viz., the procurers ; it goes too far, and yet not far enough. If it had said, that if any of the said offences shall be committed upon the land, then, by express reference to the antecedent section, both classes of offenders would have been comprehended ; but by going on to enumerate the first class only, and stopping short, without advancing to the second, the generality of the terms “any of the offences aforesaid” is limited and narrowed to the precise and defective enumeration, viz., “Any of the said offences, in willfully casting away, burning, or otherwise destroying any ship or vessel ;” and, consequently, the statute only directs that if the offences so enumerated, and not all the offences generally, shall be committed upon the land, they should be tried by the ordinary courts, and if on the sea, by the admiralty, appointing no jurisdiction whatsoever for the accessory, who, at all events, if an accessory upon the land, to this new offence, if consummated upon the sea, could most unquestionably be tried by no jurisdic-

tion whatsoever. If wholly committed upon the sea, it would have been different; but when part of this new offence happened to be upon the land, and part upon the sea, it is perfectly plain, from all that I have been so long troubling you with, that without a jurisdiction given by the statute itself, there could be no jurisdiction at all.

But supposing me to be mistaken in this objection, and that the words I have commented on do not furnish it—supposing that this concluding sentence had expressly said that “if any of the said offences,” comprehending all of them by reference, or afterwards comprehending all of them by a distinct and complete enumeration, should, if committed upon the land, be tried by the ordinary courts, and if upon the sea, by the admiralty; still, as the statute is worded, it is most obvious that my objection would not at all be removed, or even touched. By the statute, as it actually stands, no jurisdiction at all is given for the trial of the accessory; it is wholly omitted; but waiving all objection to that omission, and taking the section creating the jurisdiction to apply to both classes of offenders, which it certainly does not, yet still it would only apply to them considering both the procuring and the destruction to be entirely upon the sea, or entirely upon the land, and leaves wholly unprovided for the case of Easterby, a procurer upon the land of a ship to be de-

stroyed, and afterwards, in fact, destroyed upon the sea.

It appears by no evidence whatever that Easterby ever had his foot on board the *Adventure*, and, consequently, what he did, he did upon the land, and it is therefore utterly impossible, without first supplying words that are omitted, and inverting them after they are supplied, to give the admiralty a jurisdiction under this statute; since it has none over offences upon the land, by the general law, or the statute of Henry VIII., and since the statute creating the offences directs them, when committed on the land, to be tried in the ordinary courts of criminal justice. If the words, indeed, had been "that if any of the said offences," comprehending all by reference, or enumerating all, should be committed upon the sea, the trial should be in the admiralty, it might have been speciously argued that it was the intention of the legislature to give the jurisdiction to the admiralty when any part of the offence took place upon the sea. But the words of the act expressly exclude such a construction, even if such a latitude could be allowed in construing a penal statute; because, after saying that, if any of the offences, no matter whether completely or defectively enumerated, should happen upon the land, it enacts, not that the trial should be in the ordinary courts, but that the same, referring to the offences, should be so tried, and,

consequently, each offence must fall to be tried by the one or the other tribunal; accordingly as it was committed upon the land or upon the sea.

Easterby, therefore, can not, possibly, upon the evidence which is now closed, stand legally for judgment before this court. I know very well, my lords, that there is nothing which a court so powerfully resists as a total failure of justice when enormous crimes have been committed; and perhaps it may be said, that if your lordships shall now decide in favor of my argument, by pronouncing against the jurisdiction of the admiralty, that I shall be found hereafter presenting a similar objection when he is indicted in the ordinary courts. To that I can only answer, that when the occasion arises, I shall do my duty then as I do it to-day; what the law says I shall then say.

Except as to the forms of trial, I can have no possible wish to oust the jurisdiction of this court. It is indifferent to me whether the anchor or the arms of the city be suspended over the heads of the judges; and for the excellent and learned person who presides on this occasion I have the highest possible respect; so I have for the jury here impanelled; but I have a right to every objection that stands with the prisoner's present safety. If my learned friend should be able to show your lordships that the proceedings must have failed if brought before the ordinary courts, that may be a

just argument, but it will be no answer to mine. The obtaining or not obtaining redress hereafter in any other place, can be nothing to the present consideration.

My lords, I have nothing to add, but that if your lordships should be of opinion that this court has jurisdiction over the prisoner's offence, and that the jury ought to be charged with the evidence, I shall offer some hereafter, in order to raise another legal objection, which, as it must rest upon a fact not yet established, and as it can not be called for unless the court has a jurisdiction to hear it, I have not even adverted to it in any thing I have said.

The prisoners, with the exception of John Reid, were found guilty, and William Codling was hanged on the 27th of November following. The case of Macfarlane and East-erby was argued before the twelve judges in the Exchequer chamber on the 13th of November, and in Sergeant's Inn Hall on the 30th of the same month. On the 3d of May, 1803, there being some doubts as to whether the procurement of the destruction of the ship by these prisoners was an offence committed by them on the high seas within the jurisdiction of the Court of Admiralty under the statute, a pardon was granted them upon the representation of the judges.

THE TRIAL
OF
MICHAEL HEDGES AND JOHN HEDGES
FOR CONSPIRACY AND FRAUD.

The information filed by the Attorney-General against Michael and John Hedges charged them with conspiring to defraud the government in the manufacture and supply of coopers' wares for the dockyard at Woolwich. The subject matter sufficiently appears from the argument of Mr. Erskine, and it is, therefore, unnecessary to insert any extended statement of the case. The cause was tried at Westminster Hall, December 7th, 1803, before Lord Ellenborough, chief justice of the King's Bench, and a special jury. The information having been opened by Mr. Peake, he was followed by Mr. Erskine also on the part of the government.

SPEECH OF MR. ERSKINE

FOR THE PROSECUTION.

GENTLEMEN OF THE JURY: This cause is of great importance, both as it respects the government which prosecutes, and the defendants who are to answer to the accusation; and as the proofs will necessarily be long and complicated, in order to establish their guilt with that precision and certainty which the law in all cases impartially requires, I will once again explain to you the nature of the charge, that you may be the better enabled to apply your minds to the consideration of the evidence by which it is to be supported.

The information charges that the two defendants, Michael and John Hedges, were employed by the principal officers of the navy, on account of His Majesty, to deliver coopers' wares, and to perform coopers' work, as occasion might require, in the dockyard at Woolwich, for prices stipulated by contract; that the several persons named in the information were, during the period in question, in different situations of public trust, as storekeeper, clerk of the storekeeper, and clerk of the cheque; and that the defendants unlawfully and wickedly conspired together to impose upon those

officers, and thereby to charge the King with the payment of larger sums of money than were really due and payable for the work performed, and the materials provided by them under their contracts ; and it is further charged that, in pursuance of this conspiracy, they procured the different officers named in the information to subscribe the necessary vouchers as for work actually done, and materials provided, without having furnished either the one or the other.

Gentlemen, the charge which I have thus stated to you was made by His Majesty's Attorney-General, at the instance of the lords commissioners of the admiralty, who had received information upon the subject from the commissioners of the navy ; and, as these great offences range themselves directly under their department, I certainly owe it in justice to those gentlemen to mention that, in the year 1797, they had made several regulations, which, if they had been observed by the inferior officers, who were bound in duty to attend to them, frauds of this enormous magnitude could never have been committed, as the following orders appear to have been judiciously directed toward the prevention of every kind of abuse :

“First, that the works necessary to be done should be pointed out by the officers in whose department they were required.

“Secondly, that when the works were performed,

they should be surveyed by three, or at least two, clerks and one officer, and an entry made in each office, according to the nature of the works done, and according to the different departments under which they ranged themselves.

“Thirdly, that the entries made in these offices should be compared with each other previous to any bill being made out for the amount of the work done.”

It is certainly but justice to the authors of these regulations, to remark that the observance of them would have greatly contributed to the prevention of every kind of fraud ; because, if no workman could be set to work until those in whose department it was to be done had sanctioned its necessity ; if, after its performance, no voucher could have been made out, but upon actual survey by men of skill and observation ; and, lastly, if such vouchers could not have been delivered for payment till after these entries in the different departments had been compared with one another, government must have been perfectly secured against impositions, as far, at least, as the infirmities of all human institutions will admit of absolute security. But, gentlemen, the best laws may become useless and, in the end, pernicious, if a total relaxation in the execution of them is suffered to prevail ; and I am sorry to be obliged to lay before you a system of plunder arising from habitual neglect, and false

confidence in those whose duties I have described to you, which, if suffered to pass unpunished, would soon extend itself, if it be not already more or less extended, throughout all the departments of the naval expenditure, till the country might be actually pulled down by the burden of a system which, prudently administered, is the very foundation of her glory and her strength.

Shall I be believed, gentlemen, when I tell you that the subject matter of your present inquiry is a fraud and peculation committed in one dockyard only, by two contractors, or, more properly, but by one, as the two defendants are partners; confined to the course of a single year, or a little more, and in one insignificant corner of the necessities of the British navy, by a single working cooper, employed in the hooping of casks and the masts of a few ships? Shall I be heard without astonishment, gentlemen, when I state to you that in this almost invisible corner of the necessities of the navy, in this one dockyard, by this single cooper, during one year only, upon work amounting but to the sum of two hundred and thirty-five pounds five shillings and five pence, in which I include all the value of the materials and the fair profit of the tradesman as settled by the contract, government, by the frauds which are the subject of our inquiry, has, over and above this sum contracted for, paid to the defendants, upon the

vouchers procured by them, the further sum, you will think I am mis-reading the figures which lie before me, but I give them to you correctly, two thousand four hundred and fifteen pounds? They received, indeed, in the period in question, two thousand six hundred and fifty pounds, but the sum I first gave you is the amount of the net robbery and pillage of the country.

Gentlemen, it is impossible for any reflecting and considerate mind not to pause here a little, and to consider the state and condition of our country, if these frauds should extend themselves, much more, if they are in any degree already extended throughout the vast extent of the demands and necessities of the navy of Great Britain, from the first preparation of timber for the construction of our ships, throughout the process of their building, in the providing of their masts, sails and rigging; in the supplying them with stores, furniture, and provisions; in the aggregate, in short, of all which enters into the account of this stupendous fabric of our national safety. For myself, I shrink back from the contemplation of such evils; but it is our duty to contemplate them, and to provide the remedy. Let us then consider, gentlemen, the state and condition of our country at this momentous crisis; it is no unfit digression when the objects of this trial are reflected on.

We behold, at this moment, the great powers

of Europe, which formerly held its balances, looking silently at one another, inactive spectators of the mighty preparations of France, avowedly directed to prostrate or overleap the only mound which opposes itself to her universal dominion. We see upon the shores of the continent, from Spain to the Baltic, numerous armies gathered together, and fleets constructing for their passage, and we see our own country in arms from one end of it to the other. No man can place a greater reliance than I do upon the bravery and zeal which inspires us; but neither bravery nor zeal can defend us against a procrastinated contest, if the sources of our strength are suffered to be undermined by fraud in the administration of our finances.

Let it be remembered, that we are not merely contending to remain upon the soil in which we have been planted by our fathers, from whence no human strength can drive us, but we are in arms for the inheritance of our laws and independence, which the wisdom of ages has matured for our happiness; and let it never be forgotten that neither laws nor independence can have a separate existence from the public honor and faith of Great Britain. It is our public faith which has placed us at the head of the nations of the earth, and we must descend from that proud eminence the moment that it is broken. But the public faith of a



nation, like the private faith of an individual, must depend upon resources, and resources must forever depend upon economy. The analogy is self-evident, and I pray you to consider it. What fortune, however ample, beyond every computation of necessity, or the highest scale of luxury, could support a fraud upon every payment in the proportion of £2,400 upon £235? The richest trader in Great Britain must, upon such a footing of expenditure, inevitably become bankrupt.

The cause, therefore, is one of the most momentous that can be offered to the consideration of a court of justice; but, for that very reason, the defendants are entitled to a greater share of your attention. In proportion to the magnitude of the crime, and the severity of the punishment which attends it, your ears should unquestionably be open to those who are to repel it.

Gentlemen, these frauds have but very lately come to light, and have been forced into day by the spirit and perseverance of the noble person at the head of the admiralty, who brought them under the consideration of the Attorney-General, whose deputy I only am, by his desire, in laying the matter before you. I owe it in justice to that noble admiral to say, that I can scarcely remember his merits as a captain of a British man-of-war, in the beginning of his life, bringing the superior ships of our enemies into our ports—I

can scarcely recollect him, even off Cape Saint Vincent, on that memorable day of national glory—because, in my mind, he has eclipsed all his former reputation by his present exertions at the head of the board where he presides, fighting against corruptions, which, unless they are subdued, will destroy every effect of bravery and skill. In this virtuous pursuit he has had to encounter enemies hitherto unknown to him; he has had to encounter misrepresentation and falsehood; but, to use the expression of a most eloquent writer, whose writings will perhaps hereafter be the characteristic eloquence of Great Britain, “He will remember that obloquy is a necessary ingredient in the composition of all true glory—he will remember that it was not only in the Roman customs, but that it is in the nature and constitution of things, that calumny and abuse are essential parts of triumph.”

Gentlemen, I will now state to you the manner in which the fraud was committed and detected, and the evidence by which we shall establish it.

The navy board has been in the course of contracting with different persons, in the different departments, for a great number of years, by which certain prices have been established for almost every article required in the dockyards. These contracts have generally been made for a year or two only, but to continue afterwards until

terminated by a six months' notice on either side.

As long ago as the year 1745 the commissioners contracted with Mary Gunter to supply the dock-yards of Deptford and Woolwich with stores of the same description as those provided by the defendants; that contract was continued to the year 1782, when it was transferred, by a new agreement, to Messrs. Young, Adams, and Corsen, who contracted as the guardians of those unhappy men, who were then infants and orphans; their mother, in her life time, having had the contract with government. The contract runs thus: "We do hereby bargain and sell to His Majesty, and oblige ourselves, free of all charge, to supply His Majesty's yards at Deptford and Woolwich with all such nunn buoys, buckets, barrels, rundlets, hoops for masts, and all other particulars mentioned in Mrs. Mary Gunter's contract, of the 18th of April, 1745, as shall from time to time be demanded of us by the principal officers, commissioners, the proper officers of the yards." Then follow the different prices at which these different articles were to be provided and manufactured. And Messrs. Young, Adams, and Corsen having afterwards requested that the contract so held in trust might be transferred to Michael and John Hedges, an order was issued accordingly, dated the 2d of June, 1801, directing the certificates to be made

out in future in the names and on the account of the defendants. Thus the original contract of Mary Gunter, which passed to the guardians of the defendants, was, on their coming of age, assumed by themselves.

The defendants being now contractors with government on their own account, took occasionally into their service William Roberts, who had been formerly an apprentice to Young, Adams, and Corsen, and began to instruct him in the practice of frauds, which, though they do not come in point of time within the scope of the information, will, nevertheless, become unquestionable and decisive evidence, because the subsequent instructions employed by them in practicing the impositions in question were referred to these former instructions. We might rest, indeed, upon the mere comparison between the work done and the materials provided, with the vouchers for immensely larger amounts. This medium of proof would in itself be sufficient; but we shall prove the direct instructions for the fraudulent differences, the bribes given to their servants for their instrumentality, the actual frauds committed under their influence, and the actual loss which fell upon government, from stage to stage, as they were accomplished. The inducement to fraud held out by the defendant John Hedges to Roberts, his servant, was this, that whatever quantity of work he could bring a note

for from the clerk of the storekeeper he would pay him proportionably for his labor, as if the work had actually been performed; and having thus secured punctuality in imposition, he directed that whatever work he did, were it but a hoop upon a single cask, he never was to charge less than for the cooperage of an hundred barrells, and if there were more than an hundred, there were to be no fractions, but he was to charge two hundred, and so in proportion. These were the instructions which, long before the period of this information, were given by John Hedges to his servant. Roberts himself will prove that, during his time, he has heard both the defendants justify this practice, saying, that unless the work was overcharged, the contract would not be worth having; and he will swear that, at their express desire, he instructed John Gardiner, who was to succeed him, in the manner of making these charges, and of procuring notes from the storekeeper's clerk for the fraudulent excess. This Gardiner succeeded Roberts, who had been thus employed, in the same nefarious transactions, previous to the time comprehended in the information; but, as the instructions were given to Roberts by the two defendants, and as they further directed him to instruct Gardiner, who succeeded him, and as Gardiner, in pursuance of these instructions, carried on the frauds within the period in question, the original

instructions to Roberts become unquestionable evidence; not, indeed, to affect the defendants with the penalties beyond the scope of the charge, but to fix them as the criminal sources of all the frauds committed within the limits of it.

Gentlemen, I will now state to you the manner in which these frauds were accomplished; and the uniform success of them undoubtedly reflects very deeply upon the conduct of several inferior officers, who are paid by the public for the discharge of duties which appear to have been wholly neglected; at the same time, I am bound in justice to admit that the manner in which they brought these conspiracies, when detected, to the knowledge of government, though it implicated themselves in the charge of extreme inattention, exempts them from the slightest suspicion of having been criminally privy to any of them though they certainly had greatly relaxed in the observance of the duties imposed upon them by the regulations of the navy-board.

Under these regulations, the work should have been first determined to be necessary, and pointed out for execution, instead of suffering the contractors to come into the yard and cooper at their own pleasure, and for their own benefit. Secondly, when the works were performed, they should have been surveyed by three, or, at least, two clerks, and an officer, and an entry made at each office,

authenticating, from actual measurement, the service to be paid for; and, thirdly, the entries in these different offices should have been compared, as checks upon one another, previous to any bills being made out for payment. But instead of any attention to these salutary provisions, the mode pursued was this: the defendants sent their workmen whenever they pleased to the dock or ropeyard, who, after having done what work was wanted, and frequently no work at all, made out a note, in the form which will be exhibited in evidence; this note, which contained just what the workman thought fit to put in it, he carried to the store-keeper's office, and, upon telling the clerk there that he had done the work contained in it for that was the whole form gone through, the clerk, without any survey, according to the regulations of the navy-board, entered it in the workmanship book, which then became a kind of record, and all the subsequent vouchers, instead of being founded upon actual examinations in the different offices, only tasked back to the workmanship book, which being, as I have already described it, a mere copy of the note, without examination or even question, there was no possibility of detecting the fraud through any of the stages toward payment. In this manner the impositions were practiced, first by Roberts, afterwards by Gardiner, and after him by Havinden, who succeeded him; each of them,

in their turns, doing some work, or no work, and setting down just what they pleased, or rather what they were directed by their masters.

Mr. Garrow. It has been communicated to me that it is wished the witnesses for the Crown should go out of court, that they may be examined apart; all the witnesses on both sides must therefore withdraw.

[After the witnesses had withdrawn, Mr. Erskine proceeded.]

Gentlemen, I was stating to you that instead of any observance of these regulations for the protection of the public, the cooper's workman put down upon a piece of paper just what he chose, no man seeing his work done, no man measuring it, no man checking it in the offices through which it passed. If one hoop was put upon one cask, he set down six hoops upon one hundred, and was paid for his personal labor by his masters as if the whole of such work had actually been done; and it can not, therefore, be doubted that, with such a strong impelling motive to persons in these low situations, they would be most scrupulously uniform in these fraudulent accounts. The routine was universally this: The clerk in the store-keeper's office, on having these false notes presented to him, containing six hoops on two hundred casks, or any other

work, transcribed it, as of course, into the workmanship book, and signing his name to the notes so entered, returned them to the workman, who delivered them, from time to time, to the defendants, who, at the end of the quarter, sent them in as vouchers to the clerk of the cheque's office, with an account drawn up of their aggregate contents. In the clerk of the cheque's office they have no means of examining the work, and the notes were therefore only compared with the workmanship book, which could not but uniformly confirm them, since it was itself only a copy of the notes themselves; the workmanship book was as sure to support the account of the work as a man is sure of seeing his own image when he looks into a glass. After this faithful correspondence of accounts and quantities, a rough certificate was prepared, as of course, containing a specification of the articles, with their quantities, rates, and values, to be passed through the other offices; but in all of which, without any fraudulent privity in the officers, the different entries being compared with the very image of the original fraud, committed through the instrumentality of the workman, the imposition, instead of being detected, received the sanction of all the departments, until a certificate was made out, as a foundation for a navy bill, to be drawn upon the treasurer of the navy for payment upon these false and fabricated accounts. In

this manner, instead of each office being, in its turn, a check upon the office preceding it, and all of them a check upon the contractor, the contractor himself, through his servant, uniformly obtained the original false entry in the first, which, becoming a voucher to the second, passed on to the third, each officer leaning upon the supposed examination of another, when, from the beginning to the end, none had ever taken place. It may be said, that the witnesses, by whose evidence these frauds are to be established, after having pillaged the public to enrich themselves, come here to throw the blame and odium on their masters; and it may be said also, that, as accomplices, they are unworthy of credit, but to these observations, if they are made, there is this plain answer: the fraud does not consist merely in the overcharge of the men's work, which rests upon their testimony only, but in the charge of materials never furnished. If the materials were furnished, the defendants have the means of showing it. They say, for instance, that between the 11th of March, 1800, and the 11th of December, 1801, they coopered so many casks, which took materials to the amount charged. I answer, first, there were not so many casks in the whole dockyard; secondly, where were the materials purchased? By whom and to whom were they delivered? And where are the entries in your books of this stock in trade? If

the witnesses, therefore, shall swear falsely, the defendants will have it in their power to contradict them.

After having proved the instructions given to Roberts, we shall prove that the same were given to Gardiner, and especially as to the hooping of ship masts. John Hedges gave him particular orders never to charge fewer than one hundred and twenty hoops for each ship, although, upon an average of the different rates, twenty were sufficient to send them completely equipped out of the dock. If the truth of this testimony is disputed, I ask the same question, show me how many hoops you had in store? from whom you purchased them? and to whom you delivered them out? and what were the ships which could possibly require such a number? Suppose, besides, a fraudulent servant to have said to his master, deliver to me a thousand hoops for the masts in the dock-yard, the master must have immediately known that such a number could not have been required. The case, therefore, will not rest upon the mere evidence of accomplices, but will receive support from the nature of the transaction itself, and from a deficiency of proof on the defendant's part, inconsistent with an actual supply to the extent of the charges.

Gardiner was succeeded by Havinden, and upon his entering into the same service, the defendant,

John Hedges, showed him a certificate in Gardiner's hand-writing, and told him he was to make out his certificates in the same manner, which he did accordingly, from that time to July, 1802; and, upon the whole, it will appear that this system was pursued by the defendants from their first taking up the business in 1793, down to the month of May, 1802, by the instrumentality of Roberts, and by instructions from him from 1793 to 1799, which will be evidence of their purpose, though not within the scope of the information, and which was carried on afterwards, within the periods charged, by Gardiner and Havinden; by Gardiner from 1799 to 1800, and by Havinden from January, 1801 to May in the year following.

Gentlemen, I will not detain you longer with any farther observations in this stage of the proceedings, having no other view than to render the evidence intelligible. The defendants were very desirous of getting the witnesses out of the hands of government altogether, contending, as they probably will contend to-day, that they themselves were the victims of their servants' malpractices. I have already repelled the possibility of such an argument in their exculpation; and, indeed, in such hands as the defence is placed I can hardly expect such an attempt. It has also been said, that even admitting the facts as I have stated them, though it would amount to such a gross and unjust

overcharge as might wholly discharge the right of action for the demand, yet that it can not be considered as a criminal offence. This, however, I am persuaded, will not be said in court, because, under the circumstances of this case, such a defence is impossible.

COURT OF KING'S BENCH.

FEBRUARY 6TH, 1804.

The defendants having been found guilty, the Attorney-General prayed the judgment of the court.

Lord Ellenborough read his report of the evidence on the trial.

The following affidavit, made by the defendants, was read :

In the King's Bench.

THE KING *against* MICHAEL HEDGES *and* JOHN HEDGES.

Michael Hedges, and John Hedges, of Rotherhithe, in the county of Surry, coopers, the defendants above named, severally make oath, and say ; and first, this deponent, Michael Hedges, for himself saith, that he hath a wife and three children, who solely depend upon him, this deponent, for subsistence, and the eldest of such children is not more than ten years of age. And this deponent, John Hedges, for himself saith, that he hath a wife and three children, and that his said wife is at this time in a pregnant state, and is in daily expectation of being delivered ; and farther saith, that the eldest of such children is not more than seven years of age, and that his said wife and family are entirely dependent upon him for subsistence ; and farther saith, that his wife's father, and aged and infirm man, hath lived with him, this deponent, and his family, for these last seven years, being destitute of every other means of support than what he derives from this deponent. And lastly, these deponents, upon their oath aforesaid, most solemnly assert that, although they have ever since they succeeded to the business

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on their own account conducted themselves and their families with every attention to economy and frugality, they are worth but a few hundred pounds beyond the small capital which they received from their guardians upon their taking to the business. And they most humbly beg leave to express their sincere contrition for their offence, and at the same time, to submit themselves to the mercy of this honorable court, humbly hoping that their sentence may be such as may exempt their numerous and unhappy families from being involved in the disgrace of an ignominious punishment.

MICHAEL HEDGES,
JOHN HEDGES.

Sworn at the Treasury Chamber, Westminster Hall,
by the above-named deponents, Michael Hedges,
and John Hedges, this 6th day of February, 1804.

N. GROSE.

MR. DALLAS.

MY LORDS: I was of counsel, on the trial of this information, for the defendants, and most undoubtedly, after the evidence which your lordships have just now reported, it would be quite impossible for me, even if it were regular, to make any of those observations your lordships heard in the last case, to draw into doubt the verdict; in truth, it is impossible, after the evidence of the witnesses, to deny the guilt of these persons. In their affidavit they acknowledge their guilt, and express, as it becomes them, the utmost contrition. At the same time, I can not help thinking and feeling that they are to be considered, to a great degree at least, as unfortunate. It appears from the evidence, that they came into possession of this business, and into the management of this extensive contract, at a very early period of life, the youngest not being then of age. The contract had been for a considerable time in the family, and was carried on for the benefit of the mother, and of these persons while they were infants. It was also proved, that, by the regulation of the dockyard, it was incumbent on the clerk in whose department it was to report the work which was necessary before it was done, and afterwards to survey

it. That it appears upon the evidence, which, unless it were sworn, it would be almost impossible to believe, that for a great number of years the officers of this dockyard have uniformly abandoned this part of their duty, and that in consequence of that neglect, these very young men, in the execution of their contract, were unfortunately exposed to a temptation which they had not virtue enough to resist. It is stated on the face of the information that they fraudulently procured different officers of the dockyard to sign these vouchers. The case, undoubtedly, would have been very different from what it is, if they had done this in consequence of any corrupt influence, made use of for this purpose; but I dare say it has not escaped the court, that the information acquits them of this; for it does not charge them with conspiring with the officers of the dockyard to make these vouchers, but with persons unknown. I think the information must be taken entirely to acquit them of any attempt to bribe the officers; and, indeed, one can not suppose anything so injurious to the persons who have the conduct of these departments of government, as that they would suffer those officers to remain if there were reason to imagine that they had been influenced by corruption.

I certainly can not deny that this is a case of fraud, the exact extent of which does not appear, which these persons have been induced to commit

from the temptation to which they were exposed. The circumstances which they have set forth in their affidavit respecting their wives and their families, I am sure your lordships will take into your humane consideration, and let them operate as far as you can. Their characters appear as good as they can possibly be; and I can not agree in the observation of the Attorney-General, in the last case. It appears to me not to be a doctrine the court would wish to encourage, that no distinction is to be made between men of good characters and bad characters, and that, if men have, in a single instance, deviated from the paths of virtue, no difference is to be made between their case and that of persons who have been engaged their whole lives in acts of fraud and injustice. I am sure your lordships will take this, with all the other circumstances, into your consideration, and pass as light a punishment as you can, consistently with the justice of the case.

Mr. Gibbs. I am also of counsel for the defendants. I feel it impossible to add anything to what Mr. Dallas has said. It is for the court to say what weight is due to those circumstances of alleviation which have been stated by Mr. Dallas, and I will not consume the time of the court in repeating them.

Mr. Attorney-General. I was not able to attend the trial. My friend, Mr. Erskine, conducted the prosecution.

Mr. Erskine. In the necessary absence of the Attorney-General I attended the trial; and, to be sure, a more disgusting scene, to any man of any sensibility, either as it regards public or private worth, never was exhibited in a court of justice. There must be some limitation, undoubtedly, to what is to be expected from the court, on account of the character which the persons standing here have been supposed to deserve from the public; and I might in this case add to the frauds which these men have been committing, their fraud upon the public in passing for men who deserved any reputation at all; for it is like the case before the court a few months ago, of men who had deserved well of their private friends, and of the public at large, who had exposed themselves to danger in the defence of their country, who had devoted themselves for a number of years to their duty, with honor to themselves, and advantage to their country; whereas Mr. Dallas has adverted to that which is true, that these persons came into this trade the moment they were of an age to have the control over their own affairs; that they began whipping from the post in their career of fraud without losing one moment of their precious time, and gave these iniquitous commands to their ser-

Wants at a time of life when it is not common for men to have arrived at the degree of infamy which must have belonged to them at the time they gave them.

It is a pleasant and a useful thing, that the affidavit they have made has been read, and I hope it will be generally known, and that it will be taken to be true, though there is no reason to suppose it to be true because they have sworn it. I hope that it will be believed to be true, for it will convince the public that honesty is the best policy ; that if they had conducted themselves with honesty, and with that economy which they wish to induce your lordships to believe they have, they might have made that profit which tradesmen are expected to make ; but that, notwithstanding these enormous frauds, they are just where they began ; that they have derived no profit from the monstrous and iniquitous frauds they have practiced.

The consideration of their circumstances, and their families, may, perhaps, influence your lordships, as far as it goes, with regard to any fine which you may be disposed to inflict ; but I apprehend your lordships will pronounce a sentence of a very different kind ; that your lordships will pronounce a sentence which will expose them to that infamy which their crime demands. Your lordships are not only in this court, but in your circuits, as judges, obliged to pronounce punishments reach-

ing even the lives of the offenders, for offences committed under great and sudden temptation, under circumstances of great distress and poverty ; yet, nevertheless, the law commands the sentence, and your lordships are bound to pronounce it. But in this particular instance there is no sudden temptation. The crime committed here, and for which they stand for judgment, is not that which has come upon them on a sudden before they could recollect the duties they had to reform ; it is an old and systematic fraud, which extends to an amount that almost surpasses belief, and requires a severe example to be made of these two persons ; and it is extremely difficult to discover frauds of this kind, for Mr. Dallas says, that their offence is diminished by their not having bribed the officers. The fault of the officers was in believing what these persons who have sworn to their character believed, that they were honest men. The lords of the admiralty, and the commissioners of the navy, have not removed many of those officers from the situations which they held, under the idea that, though they were not sufficiently careful, they were not cognizant of the frauds which were in the course of being committed. For, as to these men, it was not necessary they should be corrupted. They received, taking them to be true, the accounts which the defendants' servants were in the habit of bringing ; and your lordships find that those

accounts were made out in consequence of a direction from the defendants, and that the direction given by the defendants to their servants was not in one or two instances, not in a particular case, but an universal command, wherever you go to hoop one barrel never charge less than an hundred; and if you put hoops on the smallest vessel which ever comes into this dock, never charge less than an hundred and twenty, though it was impossible they could require above forty; and this, as I had occasion to remark on the trial, in a corner of the necessities of the British navy, by one contractor, in one dockyard. And here let me observe, that if such frauds as these are extended throughout all the immense extent of the outfit of the British navy, all the gallantry of our seamen, and all the excellence of our marine, in every respect, would not save the country from ruin. I apprehend, therefore, I should be abusing your lordships' time and patience if I were to say more. It depends more on your jurisdiction than your discretion. Your lordships will see up to what extent, in a case of misdemeanor, you can pronounce a severe and an exemplary punishment.

The defendants were committed, and ordered to be brought up again on Saturday, the 11th of February.

COURT OF KING'S BENCH.

FEBRUARY 11, 1804.

The defendants being brought up to receive the judgment of the court, the defendant, John Hedges, presented the following petition, which was read :

"To the right honorable Lord Ellenborough, Sir Nash Grose, Sir Soulden Lawrence, and Sir Simon le Blanc.

"The humble petition of John Hedges, of Rotherhithe, cooper, respectfully sheweth :

"That your petitioner, deeply lamenting the unfortunate situation his breach of the laws of his country has placed him in, and fully sensible of the heinousness of the offence against his King, and against society, that he has been guilty of, most humbly and submissively bends to the justice of the verdict, and the consequent punishment that awaits a crime of such magnitude as that of which he stands convicted.

"Your petitioner, throwing himself on your lordships' equity and humanity, humbly presumes to state, in justice to his unfortunate brother, implicated in a crime committed alone by your petitioner, that neither directly or indirectly was his brother privy to, or concerned in, the fraud and imposition on His Majesty's government, inasmuch as that branch of the business of your petitioner's house was exclusively confined to your petitioner.

"Your petitioner humbly submitting to your lordships, that a comparatively innocent man, and his helpless family, may not become the victims of a connection without a participation in the crimes of your petitioner, therefore most humbly prays that the whole weight of the punishment, however severe it may be, which your lordships in your wisdom shall deem it necessary to inflict, may solely and exclusively attach on your petitioner.

"And your petitioner, as in duty bound, will ever pray.

"JOHN HEDGES."

MR. JUSTICE GROSE.

MICHAEL HEDGES AND JOHN HEDGES:

Upon the charges in the information filed against you by His Majesty's Attorney-General, you have been tried and convicted, and that conviction has disclosed one of the most complete systems of fraud that can be invented by a servant to involve in ruin his employers. Those who heard the report, and reflected on the consequences of these transactions, must shudder at the prospect of that ruin which, however abundant our commerce and resources may be, must attend reiterated frauds, in which so many seem to have been concerned, and I lament to say, hitherto with impunity. From the open and undisguised manner in which it was practiced, you seem to have bidden defiance to detection, relying on the frequency of the like crimes in others as a prevention of every one in the dockyard, who must be privy to these frauds, disclosing the parts you took in them, lest they should be accused of similar practices. To such a degree of enormity have they prevailed, that the only ground we heard of in mitigation of your offence was, that having observed other officers in this dockyard to have abandoned the execution of their duty, you were exposed to a temptation that

your virtue could not resist. That ground of mitigation, in a court of criminal jurisdiction, is not to be tolerated for a moment; it would lead to encouragement of every crime, and, in the end, to anarchy and the breach of every law, and tending to justify rapine, robbery, and murder, by the commission of rapine, robbery, and murder by others. Experience and common sense dictate, that the more inveterate a disease is become, the more powerful the remedy should be to eradicate it. We were not surprised that we heard such observations from the counsel, for they are justified by the report; and it may be hoped that if others in these dockyards, whose duty it is to watch over the interests of that public who employ and pay them for so doing, have not yet heard it, that it will not be long before they shall; and that neither the frequency of the offence, nor the rank of the offender, shall protect those who prey upon the vitals of this injured country from condign punishment. Most truly it was observed at the bar, by the counsel for the Crown, that all the gallantry of our officers in the field can never save a country from ruin in which frauds like the present, so undisguised, so universal, so ruinous, shall pass unpunished. As to the particular proofs of the offence, they were so repeated and so extensive that skepticism itself could not have hesitated about your guilt. Your general orders to your

servants were, never to charge less than a hundred barrels, however few were delivered; those orders were punctually obeyed, and we find articles charged for occasions for which they could not even be used, which must have been known to others not now before the court. One great aggravation of your offences is, that you paid your servants in proportion to their surcharge, and thereby bribed them, unable to resist the temptation to increase their illicit gains for the sake of increasing your own; a more destructive system of peculation by servants, and consequent ruin of their employers, ingenuity could not have devised. The amount of all your frauds is incalculable; and we can only conjecture what it might be, when we attend to the order above stated given to your servants, and observe the mode in which you proceeded, and charges amounting to no less a sum than £3,242, 17s., for stores supposed to be delivered within the period specified in the report.

We have attended to the petition which you, John Hedges, have delivered in behalf of Michael Hedges, the wretched partner of your trade and of your delinquency; unfortunately it has no foundation in truth; the guilt was brought home to each of you; so that no possible doubt can exist in the mind of any one on that subject. If frauds like these continue to be practiced with impunity, the ruin of this country is inevitable; and

it is impossible, under such circumstances, that any taxes can keep pace with the rapacity of our servants. To save the state from ruin, your punishment must be exemplary, that men, by your example, may be taught that honesty is the best policy.

We have likewise attended to the evidence given in your behalf, ascribing to you the characters of honesty and integrity, upon which I shall only say, that I sincerely hope that the punishment that we are compelled to inflict will induce you to deserve characters in future which you have so little merited hitherto. Taking all the circumstances of your case into consideration, we do order and adjudge that you do each of you pay a fine to the King of five hundred pounds; that you be imprisoned in His Majesty's gaol of Newgate six calendar months; and that during the first month of that imprisonment you and each of you do once stand in and upon the pillory for one hour, between the hours of twelve at noon and two in the afternoon, in that part of the street called the Strand, opposite Somerset House; and that you and each of you be further imprisoned in His Majesty's gaol at Newgate until such fine be paid.

THE CASE OF
PLUNKETT *v.* COBBETT,

FOR A LIBEL.

This was an action for damages brought by W. C. Plunkett, Solicitor-General of Ireland, against William Cobbett for the publication of a libel upon the plaintiff. The case was tried by a special jury before Lord Ellenborough, lord chief justice of the King's Bench, at Westminster, May 26th, 1804. The reader will find in the argument of Mr. Erskine a sufficiently clear and exhaustive statement to enable him to comprehend the merits of the case.

SPEECH OF MR. ERSKINE,
FOR THE PLAINTIFF.

MY LORD, AND GENTLEMEN OF THE JURY:
Independently of the panel annexed to the record, which enabled me to see that I was before the same jury who, the day before yesterday, tried the defendant for a libel on His Majesty's government of Ireland, I could not help observing, from my familiarity with your features, that I was in that situation ; a situation which the defendant could have prevented had he thought proper, because being called upon to answer in an action for slander, it was in his power to have selected another jury, either by a particular application to the court, or by availing himself of his right to expunge from the panel the names of any persons whom he might dislike. But, gentlemen, I am not sure that he has not made a prudent choice in having the same persons to try him a second time ; because it affords him the opportunity of introducing himself to your attention by the character which has been given him with regard to his talents, his education, his morals, and his attachment to the constitution of the country. So far, therefore, am I from wishing you to forget that

the defendant is not a low, obscure, contemptible, and uninteresting individual, I am rather desirous that you should contemplate him as he has been described by his counsel, a gentleman of great talents, possessing the advantage of a powerful and energetic mode of expressing his sentiments in writing; one who well knows how to wield that useful weapon the pen—that weapon so dangerous when not restrained by morality and by law;—one who having raised himself from humble parentage by his intellectual endowments, ought to have recollected that others who had done the same were as jealous as himself of their fair fame, reputation, and the esteem of the world.

Gentlemen, the defendant, Mr. Cobbett, is called upon to answer for part of the same libel which was laid before you the other day, at the instance of the Crown; for, by the mode of libeling which Mr. Cobbett has adopted, he takes care to throw far and wide his slander, and has thereby rendered it necessary for an individual who has been grievously calumniated to come forward in vindication of himself against an attack upon his character, through the medium of the magistracy, and the situation which he holds as Solicitor-General of that part of the United Kingdom called Ireland. It is not for me to enter into the considerations which determined you in your former verdict; but I confess it appeared extraordinary to me to hear

it stated by the defendant's counsel, that the libel was dictated by a regard for His Majesty's government, and a zeal for the constitution of the country, when, at the same time, the author describes that part of the United Kingdom as brought into peril by sedition and rebellion, and shaken to its centre by intestine commotions; and, by way of curing that strife and discord, represents his Sovereign, whom he professes to love, but whom he can not love if he is guilty of the libel before you, as employing his executive authority at this awful juncture in selecting persons who, so far from having the capacity to govern a country, are not fit to be constables for the meanest parish.

Because a person in Lord Hardwicke's situation chooses to devote his leisure hours to agricultural pursuits, Mr. Cobbett represents him as a nobleman, "having a good library in St. James' square, and celebrated for understanding the modern method of fattening a sheep as well as any man in Cambridgeshire." He takes the same liberty with another noble lord, with whom we are all well acquainted, I mean Lord Redesdale, who is represented as "a very able and strong-built chancery pleader from Lincoln's-inn." Now, gentlemen, is it a disgrace to a man to be a feeder of sheep in Cambridgeshire, or a chancery pleader? Yet, in this strain of ridicule does Mr. Cobbett treat them,

for the purpose of making the world believe that they are unfit persons for the situations their Sovereign has called them to fill. In this way he thinks fit to stab and destroy the characters of these gentlemen, and to inflict such a wound, such a dastardly and malignant wound, that I should change my opinion of you, gentlemen—and I should be sorry to do so, after so many years' acquaintance with most of your countenances—if, after hearing what I shall have to address to you, you could suffer such a libeler to go out of this court unpunished.

Gentlemen, this is a civil action; I therefore trust that you will not suffer your minds to be distracted by those important considerations of the liberty of the press which have so often agitated Parliament and courts of justice. It would ill become me to say anything against that sacred privilege; seeing that I consider it as almost the only honor of my humble life that I took an active part in framing the statute for its protection, and resisted the eminent statesmen who brought that law into Parliament which was referred to on the former trial, and so ably commented upon by my learned friend Mr. Adam. The reason of that law was this: it never was disputed, it never can or will be disputed, that a man is entitled to that tranquillity, happiness, and peace of mind, which is the result of an honorable reputation, provided his

conduct in life entitles him to it. There is implanted in every man's bosom an invincible sensibility to the opinion of his fellow creatures, which nothing can destroy; it is the foundation of all patriotism, the sentiment which rears states from infancy to maturity, the principle that makes men struggle for distinction, and keeps them in the straight paths of their duty when called to the high offices of magistracy. The laws of society, therefore, protect mankind in this dearest of all human blessings; and if any man writes of another that which is injurious to him in his trade, profession, or character, or which tends to expose him to penalties, or brings him into contempt, it is libellous, and the law deems it an object of penal animadversion. To use the language of Lord Chief Justice Holt, "words tending to scandalize magistrates, or persons in public trust, are more injurious than when spoke against private men," and for this obvious reason, that magistrates are placed on a pinnacle to which the public attention is directed; they know that the public have a right to call on them for an account of their conduct; whereas private men are known only among the circle of their own families and immediate friends.

In the case before you, my client is attacked not only as a private individual, but as a magistrate, also; it is, however, necessary that, in appealing for satisfaction, he should come into this court

erect in his integrity, and conscious of his innocence. If he is the man Mr. Cobbett has represented him, it was for the defendant to have justified the libel, and to have proved it; but this he has not so much as attempted to do. Had he done so with success, I would rather die than hold communion with an abandoned, profligate wretch, such as my client is here represented to be. It never can have been said, that it was other than a question of law what was a libel which brought a man into contempt; it is a question of fact whether it has been written, and the meaning and intention of the author is also a question of fact. With respect to libels which have a tendency to bring the government into contempt, the question of law is mixed with fact, upon which the judge is to state general principles, leaving the jury to draw their own conclusions. It was not Lord Mansfield who first departed from this rule; it had been departed from by judges before his time for so long a series that his lordship considered juries, the moment the publication was proved, without any jurisdiction to consider its tendency, but bound to return their verdict for the Crown. The consequence of this was, that libelers became popular. They made use of the office of jury as a stalking horse to cover iniquity; and it thereby became easy to confound the most essential and substantial privileges of the people with the worst offences. To remedy this

evil the libel bill was brought in. It was a great satisfaction to my mind, to hear so eminent a person as the noble lord now on the bench, declare to you the other day, that, independently of this law, its principle is the one which he should have adopted.

In the present case I must first prove that the defendant published the libel ; but I shall not expect that you will give damages, unless I also prove that this libel is of the most malignant, injurious, and destructive nature ; that it might lead in its probable consequences to the premature death of the unfortunate person, my client, and that, at all events, it strikes most deeply at his honor.

Before the publication of this libel, Mr. Robert Emmet, the son of an eminent physician in Ireland, and brother to a barrister, had mixed himself abroad with seditious persons, who had filled his mind with an enthusiastic notion that the interest and happiness of Ireland could only be effected by a separation from Great Britain. He directed all his views to the accomplishment of this purpose. He avowed his design ; he gloried in it when the sword of justice was lifted up against him ; and when he was asked by the judge, why judgment should not be passed upon him, he entered into a declaration of his principles, and avowed his determination to die in defence of them. Lord

Norbury, before whom he was tried, fearful of allowing him to avail himself of his situation to foment rebellion, interrupted the unfortunate young man more than once. Highly as every one must approve the conduct of the noble lord, it is, nevertheless, to be lamented that it should have become necessary to have interrupted him; for, gentlemen, what will you say when I tell you that, to the confusion of this libeler, this unfortunate young man, after he retired, made this declaration, "that such had been the mildness of the government of Lord Hardwicke—of which the defendant has spoken with such contempt, because the father of the late minister was a doctor—such, I say, had been its mildness, that he was obliged to push on the catastrophe that took place, lest there should have been an end of rebellion, by the causes of it having ceased." Mr. Emmet after he had been prevented from doing any more mischief, so far from complaining that he had been insulted by my client, Mr. Plunkett, openly acknowledged that it was the wisdom, the moderation, the forbearance, the prudence, and the virtue of the government of Lord Hardwicke that were dissolving rebellion, like enchantment, by working in secret on the minds of a noble-minded people. Mr. Emmet could not wait, for fear the people should be divested of their insane prejudices. They were indeed induced to return to their duty

and their allegiance, in the same manner as the mist is dispersed at the rising of the sun, not from its heat, but the benignity of its beams. Lord Hardwicke, gentlemen, has governed Ireland in a most excellent manner. I have some reason to be acquainted with his private character, as he married one of my nearest relations. He has conducted himself in Ireland with such mildness that a change in the minds of the people has already begun to take place. It is not by long speeches that the ruler of a nation discovers his ability to govern; it is not by *sesquipedalia verba*, nor by high-sounding eloquence. In Ireland particularly, from circumstances which have occurred, the people require to be restrained with a delicate hand. Mr. Burke once said, speaking of America, "You should send her the angel of peace, but you are sending her the destroying angel." The high characters to whom I allude also appear to have adopted, with respect to Ireland, what the great Lord Chatham so well recommended when speaking of America

* "Be to her faults a little blind,
Be to her virtues ever kind,
Let all her ways be unconfin'd,
And clap the padlock on the mind."

By acting upon this principle, the government of Ireland was daily reconciling the affections of the people; so much so, that Mr. Emmet thought,

if he deferred his scheme of insurrection, it would be difficult at a future day to bring them up to the pitch of disaffection which was necessary to its success. The attempt was accordingly made. The result it is unnecessary for me to state. Mr. Plunkett, the plaintiff, was employed to assist the Attorney-General in the prosecution against Mr. Emmet; and the case was so clear, that the counsel who were engaged for that unhappy person did not call any witnesses to protect him. Lord Norbury was of opinion, that this did not prevent the counsel for the Crown from making observations to the jury. My client was far from desiring to treat with contempt or insult a man who was about to suffer death. I do say, therefore, and Mr. Cobbett was at liberty to prove the contrary if he could have done so, that Mr. Plunkett availed himself of this useful opportunity to warn others from the fate of this wretched young man. He told them that if they expected France to assist them in the forming of their republic, they would find themselves dreadfully deceived; that the time was not far off when they would see that their leader was actuated by nothing but ambition, by a desire to aggrandize his own family, and a total forgetfulness of everything that had animated the mind of the great Washington. Was not this the duty of the counsel of the Crown? This is what Mr. Plunkett did. This is what I should have

done in a similar situation. He made such observations as were calculated to redeem the people of Ireland to a love of their country, and of its government. It was not with a view to Mr. Emmet alone that he addressed the jury, but that the scaffold might not bleed in vain.

Gentlemen, I am by no means desirous of calling in question the high character which was given of Mr. Cobbett on a former day; but if he be the lover of his country which he has been described to you, he must show his attachment by obedience to its laws. The defendant has not merely thrown out the *ambiguas voces*, but, day after day, this lover of the King's government has been writing and sending forth his libels into that distracted country. It is no defence to say, that Mr. Cobbett is an admirer of the King and constitution, if he is constantly libeling the ministers of that King, and transgressing the laws of that constitution. It is nothing for a man to say, "I believe in the merits of my Saviour; I reverence my religion and my God," if he is hourly in the practice of breaking the commandments. The defendant does not fall into sin from the infirmities of his nature. The Saviour of man has said, "by their fruits ye shall know them," and by the libels which I am about to read, you will be enabled to judge of Mr. Cobbett. Although, as I have shown to you, Mr. Emmet had not the least idea of complaining of

harsh treatment on the part of my client toward him, the defendant has nevertheless thought proper to publish the following most scandalous libel: "If any one man could be found, of whom a young but unhappy victim of the justly offended laws of his country, had, in the moment of his conviction and sentence, uttered the following apostrophe: 'That viper, whom my father nourished! He it was from whose principles and doctrines, which now, by their effects, drag me to my grave; and he it is who is now brought forward as my prosecutor, and who, by an unheard-of exercise of the prerogative, has wantonly lashed, with a speech to evidence, the dying son of his former friend, when that dying son had produced no evidence, had made no defence, but, on the contrary, acknowledged the charge, and submitted to his fate.' Lord Kenyon would have turned with horror from such a scene, in which, although guilt was in one part to be punished, yet, in the whole drama, justice was confounded, humanity outraged, and loyalty insulted." Now, gentlemen, what can be said of a man worse than this? Lord Coke, with all his great fame, never has outlived, and never will outlive the memory of the manner in which he treated Sir Walter Raleigh in a court of justice. So revolting was his conduct, that it stands like a blot upon his escutcheon.

The conduct imputed to the plaintiff would have

been brutal, even if Mr. Emmet had been a perfect stranger to him, instead of "the dying son of his former friend." But the assertion is false, or Mr. Cobbett might have proved it to be true. Was Mr. Cobbett present when Mr. Emmet made use of these words? And, if not, where had he his authority? Has he any right to insert in his papers what renders me the object of universal horror and detestation? No crime can be more detestable than that which the plaintiff is here charged with; that he had "instilled into the mind of this young man principles which, by their effects, dragged him to his grave; and that, by an unheard-of exercise of prerogative, he had wantonly lashed, with a speech to evidence, the dying son of his former friend, when that dying son had produced no evidence, had made no defence, but, on the contrary, had acknowledged the charge, and submitted to his fate." He goes on to say, that "Lord Kenyon would have turned with horror from such a scene, in which, although guilt was in one part to be punished, yet, in the whole drama, justice was confounded, humanity outraged, and loyalty insulted." Gentlemen, is this true? Did Mr. Cobbett believe it to be true when he published it? But, notwithstanding this, he sells these libels to this very hour; he sells them in volumes, the more effectually to blast the character of this gentleman to future times.

But Mr. Adam tells you that his client is a man of strong powers of mind; that he writes from a spirit and principle of his own; that he raised himself to his present respectable situation by unwearied industry; that he was the son of a farmer, and the grand-son of a day laborer; that he is self-taught in the grammar of his native language, and knows how to use it with acuteness and precision.

All these qualifications I am ready to allow Mr. Cobbett, and in the exercise of these qualifications I give him the merit of having published this libel, which I will venture to say is one of the most clever, as well as one of the most wicked, efforts of his genius.

Gentlemen, there is nothing so popular in England as a judge. The people of England love their laws, and love their judges. But what does this awful libeler do? Under the mask of praising Lord Kenyon, and telling us what that noble lord would have done in such and such situations, he seizes the opportunity it affords him of sending forth against the plaintiff, Mr. Plunkett, one of the most abominable libels that ever was brought into a court of justice.

Gentlemen, upon the subject of damages I contend the injury the plaintiff has received is one of those which it is almost impossible to compensate by money. I beseech you to make the

plaintiff's case your own, and by that standard appreciate what he ought to recover. A jury can not "minister to a mind diseased," but it can, and I trust will, by an honest verdict, give ample reparation to the gentleman so basely injured, and thereby proclaim the justice of the British law.

The libel goes on to say : " Lord Kenyon must have known, that a noble duke, for having toasted at a drunken club, in a common tavern, to a noisy rabble, ' the sovereignty of the people,' was struck by His Majesty's command out of the privy council, and deprived of all his offices, both civil and military." Gentlemen, this is a libel upon the Duke of Norfolk. This libeler is not satisfied with employing single ball, but cannister, grape-shot, old nails, every thing is brought into his battery, and hurled around, so as to do the utmost possible mischief. Here is a libel, too, upon the Whig club. What will my friend Adam say to this? Gentlemen, I assure you the Whig club is not a drunken club, nor are its members a noisy rabble. But does not Mr. Cobbett know that the Duke of Norfolk is not the only man that was struck out of the privy council? Does he not know that the name of that great statesman, Mr. Fox, was struck out also? And does he not know that the person who induced His Majesty to make that erasure has since endeavored to persuade him to strike it in again? He goes on to say : " If, therefore, any

man were to be found who, not at a drunken club, or to a brawling rabble, but in a grave and high assembly, not in the character of an inebriated toast-master, but in that of a sober, constitutional lawyer, had insisted on the sovereignty of the people as a first principle of the English law, and had declared, that by law an appeal lay from the decision of the tellers of the Houses of Parliament, to that of the tellers of the nation; and that if a particular law were disagreeable to the people, however it might have been enacted with all royal and parliamentary solemnity, nevertheless it was not binding, and the people, by the general law, were exempted from obedience to such a particular law, because the people were the supreme and ultimate judges of what was for their own benefit, Lord Kenyon, if he had been chancellor in any kingdom in Europe, would have shrunk from recommending any such man to the favor of a monarch, while there yet remained a shadow of monarchy visible in the world." Here again this lover of the British constitution attacks that constitution in one of its three branches. We know, gentlemen, that every member of Parliament has a right to deliver his free, unbiassed sentiments; and if the plaintiff, in the execution of that right, did exceed the bounds prescribed by the rules of that House, it would have been a libel on the then speaker of the Irish House of Commons, who now

sits on the bench with his lordship, if he had not called him to order. Why will Mr. Cobbett meddle with matters of so high and important a nature? Gentlemen, the questions for your consideration are simply these: is the defendant the proprietor? Did he persist in the publication? Is it a libel upon the plaintiff, and does it affect him in his character and reputation? Gentlemen, if the libel be true—if the plaintiff be the abandoned miscreant here described, we ought to draw a curtain before him, and hide him from the world forever.

A thousand poignards are unsheathed to revenge the death of Emmet, and this inflammatory libel is calculated to direct them to the heart of the plaintiff. If he goes away from this court with small damages, I shall lament that I brought the business before you. The people of Ireland are deeply interested in the verdict you shall deliver. I love and venerate the people of Ireland. I love those who are loyal, and I love those who are not loyal, because I believe they will shortly become so. I trust your verdict will have the effect of doing away all jealousies and prejudices between the two countries, by showing that an Irish gentleman is not disfranchised by the union, but that, under the mild administration of the laws of England, he is entitled to, and will receive, the same measure of justice as in his own country.

Gentlemen, I shall not occupy any more of your

attention, but shall conclude with expressing a hope that I have said nothing capable of widening the breach between Great Britain and Ireland in such disturbed and distracted times.

At the conclusion of the trial the jury retired, and after being absent about twenty minutes, returned with a verdict for the plaintiff, damages five hundred pounds.

PROCEEDINGS
ON THE
TRIAL OF TROY *v.* SYMONDS,
FOR A LIBEL.

This action was brought by John Thomas Troy against Henry Delahay Symonds, to recover damages for the publication of a libel upon the plaintiff, published in the "Anti-Jacobin Review." The trial was had by a special jury before Lord Ellenborough in the King's Bench, July 11th, 1805. The case was opened by Mr. Talbot for the plaintiff, who was followed by Mr. Erskine, likewise of plaintiff's counsel.

SPEECH OF MR. TALBOT,

FOR THE PLAINTIFF.

MAY IT PLEASE YOUR LORDSHIP—GENTLEMEN OF THE JURY: In this action, John Thomas Troy is the plaintiff, and Henry Delahay Symonds is the defendant. The declaration states, that the plaintiff is a loyal subject of the King, and that he has never been guilty of any kind of treason, or misprision of treason, and until the publication of the libel complained of by this action, had never been suspected thereof. It also states, that the plaintiff is a person professing the popish religion in Ireland, and that he there exercises the functions of a Roman Catholic priest, and that he is commonly known by the title of Dr. Troy. The declaration then alludes to a certain exhortation published by the plaintiff, recommending to the persons to whom it was addressed, a quiet and peaceable demeanor, and also refers to a correspondence between the Earl of Fingal and Lord Redesdale. It also states, that in the year 1798, there was a dreadful rebellion in Ireland, and that on the 23d of July, 1803, there was an insurrection

there. It then charges that the defendant, knowing the premises, but maliciously intending to deprive the plaintiff of his good name, fame, character, and reputation, and to bring him into great infamy and disgrace, and to cause it to be believed and suspected that he had been guilty of treason, or misprision of treason, printed and published the following libel :

“ Lord Fingal then mentions, as striking proofs of the loyalty of Catholics, the address of Dr. Coppinger, to his flock at Cloyne, which recently appeared in the newspapers, and the late exhortation of Dr. Troy in Dublin.

“ Nothing affords such strong evidences of popish dissimulation in Ireland, as the exhortations of the Romish clergy, and the loyal addresses of their flocks. They have commonly been found to be sure presages of a deep-laid conspiracy against the Protestant state ; and after it has exploded in rebellion, their clergy generally lament, from the altar, the delusions of the people, and their treasonable conduct toward the best of Sovereigns, and the only constitution that affords any degree of rational liberty ; though, from the nature of their religion, they must have known, and might have prevented it. The dreadful rebellion of 1798, accompanied with such instances of popish perfidy, must convince the reader, that no reliance is to be placed on the oaths or professions of Irish

Papists to a Protestant state. Dr. Troy must have known all the circumstances which preceded the insurrection in Dublin on the 23d of July, 1803, and yet he did not put government on their guard. The present administration are convinced of his treachery on that occasion, and yet, for many years past, he had been treated at the castle with the utmost respect, and had even received favors for some persons of his own family. His exhortations, then, to which Lord Fingal alludes, must be considered as a mockery of the state—an insult to the understandings of his Protestant fellow subjects, and an unquestionable testimony of his want of candor.

“By his orders, exhortations composed by himself were read in many popish chapels in his diocese, on the morning of the 24th of July, and a few hours after the insurrection and massacre had taken place in Dublin. The reader must be convinced by the following moral evidence that these exhortations were framed previous to that dreadful event. There was no allusion to it in any of them, and the distance of the chapels in which they were read from the metropolis was so great as to make it physically impossible that they could have been framed, and sent to them, subsequent to that catastrophe.”

There are other counts, gentlemen, charging the

libel in different forms, to the plaintiff's damage of ten thousand pounds.

The defendant has pleaded that he is not guilty of this libel, and that is the issue which you have now to try.

MR. ERSKINE'S SPEECH

FOR THE PLAINTIFF.

GENTLEMEN OF THE JURY: I am much indebted to my learned friend for the clear and perspicuous manner in which he has stated the complaint which Dr. Troy makes upon this record, because by it you must already be aware of the importance of the cause you have to decide. If the Solicitor-General, who was my justly successful adversary in the last cause, obtained large damages for an assault only on the person, how much more loudly does the present call for your serious consideration. In that case the passions of the defendant were inflamed probably from great provocation; but that was held to be but little mitigation when the plaintiff's body was wounded and disfigured. How much greater then is the injury, where there is a wounded spirit, when the injury is not done to the body but to the mind, and when the offence does not arise from the sting of provocation, but was committed in cold blood. The case I have alluded to was only a sudden quarrel, yet as it was in a public place, where many persons were present, it was justly observed by the noble judge, that though public example could not strictly nor

directly apply in a civil action for damages, yet it could not be lamented when it had an indirect and almost unconscious effect on the minds of a jury in such a case. How much more, then, here, when an unoffending individual has been so unjustly and publicly calumniated; but I should be myself a calumniator, if I described Dr. Troy as only innocent and unoffending, when, with the highest possible merit, he stepped forth as a minister of religion in a most perilous crisis. If he had consulted only his own quiet, and preferred his own safety to his duty, he could not have been assailed by his anonymous libeler; but because possessing an extensive influence over the members of his communion, he employed it to recall the disaffected to their allegiance under the most solemn and impressive sanctions of the religion they professed, what injustice can be more disgraceful and disgusting than, with the full knowledge of this exalted virtue, to make it the very foundation of scandalous defamation. It is this which Dr. Troy so justly complains of as a depravity of the most dangerous character.

Gentlemen, I do not wish to overstate the plaintiff's title to approbation and admiration. Indeed I am but ill qualified to become a declaimer upon the merits of the Catholic church, being not only a Protestant, but a native of that part of His Majesty's dominions where the national church

may be said to be the very contrast of the Romish communion, and its faith, as described by a celebrated writer, being the very Protestantism of the Protestant religion. We feel, and none more than myself, that nothing has more contributed to keep alive animosities amongst mankind, and to retard the great work of reformation ordained in due season to unite the whole Christian world, than alienation from those who differ from us in religious creeds. It is an evil, however, which, thank God, is most happily passing away, and Dr. Troy has always done his part to accelerate its progress. I wish to avoid all political allusions; but this I may say with truth, that though many great and eminent men in Parliament have differed on this momentous subject, and although it has strongly agitated the Roman Catholics who seek emancipation, yet the controversies have been every where discussed with exemplary moderation; and of this I am also confident, that whatever may have been the opinion of the lord chief justice on this subject, and though adhering to the opinion he delivered in Parliament, he will nevertheless tell you, as his country has a right to expect from him, and impress it upon your attention in the decision of the matter now before you, that Dr. Troy, though a Roman Catholic, and as such holding tenets different from himself and from you, is entitled to the same measure of justice as any

other man, however distinguished by his zeal for the religious system which all of us profess. If Dr. Troy, instead of a sincere Christian teacher, had been a traitorous hypocrite, secretly wishing for resistance to authority, as has been wickedly imputed to him by the defendant; if he had been, in fact, an abettor of rebellion, instead of a dissuader from violence, making use of his religious station as a cloak only to conceal his real disposition, the truth of this might have been pleaded as a justification, and being proved, the defendant must have had a verdict; but no such plea having been put upon the record, from the consciousness that it was incapable of proof, the plaintiff stands before you in point of law, what he is known to be in fact, an innocent and meritorious person.

In actions for libels and defamation I have often said, and I now repeat it, that no money can be a compensation for calumny. Character can not be compounded for by money. If a slanderer, instead of putting me to the cost and trouble of an action, were to send the largest sum to my bankers, should I be happier on that account, when my estimation in the world was tainted? It is, therefore, an imperfection in our law, but for which there is no remedy, that neither criminal nor civil justice can restore to the calumniated sufferer what he has lost. All that your verdict can do, and that you will take care it shall do, is, that

the reproach, and your judgment of its falsehood, will go down to posterity together; so that whoever shall read this "Anti-Jacobin Review" hereafter will know at the same time that the plaintiff's reputation had been vindicated by a British jury from its scandalous injustice.

Gentlemen, Dr. Troy is a Roman Catholic priest, and titular archbishop of Dublin. The government of England is tolerant, and though its indulgences have advanced by slow degrees, yet the Catholic and Protestant world have of late been drawing much nearer together. It is a delicate subject to touch upon. The ways of Providence are awful and mysterious throughout the whole course of this lower world. We see bitter contests and sanguinary conflicts arising out of a religion established to give peace upon earth, but in the same manner, nature, through all its stages toward perfection, produces a turbulent commotion in its discordant parts; but we know that in the end there will be universal harmony in the Christian world. In the meantime it is most difficult to reconcile differences of religious faith; it is impossible at once to amalgamate mankind. It is our duty to adhere to our own establishment, but the law has in its wisdom exacted no professed mode of faith from its subjects. We have a variety of dissenting sectaries, differing as much from each other as the Church

of England from them all. But the law protects them equally in their worship, though some incapacities are enacted; and so the Protestants thought when they told Queen Elizabeth that no Roman Catholic of Ireland should be styled archbishop of Dublin, and an act of Parliament then declared it to be criminal to usurp such an appellation; but there is no Irish statute which calls for the education or the profession of children in the tenets of the established church, and differences of religious faith are likely therefore long to continue under the mild sanctions of a free government; yet, thank God, we have, and ought to have, but one object as to civil dominion. We are engaged in war with the most accomplished and powerful enemy we ever had to deal with, but we have nothing to fear if we are united. He knows and feels that discord alone can destroy us; and thinking that Ireland is the heel of the Achilles, the only vulnerable part of our widely extended empire, he exerts every influence to reach it, and it becomes, therefore, a corresponding duty in us to guard it against his attacks by healing animosities and cementing together all classes by every practicable indulgence, and by a faithful and equal administration of justice, of which you will to-day set a useful example. Many of you have, no doubt, opinions unfavorable to Catholics; but Protestants and Catholics are as one in a court of law,

and in the person of the plaintiff you will see that honor, patriotism, and truth, are to be found in the one class as in the other.

Gentlemen, you must no doubt have observed, that many noble persons of Ireland have appeared upon the bench; but not wishing to detain them to their inconvenience, they have been allowed to withdraw. Lord Fingal being sufficient for my purpose as a witness, I have requested his lordship to remain, as this "Anti-Jacobin Review," in most inflammatory terms, introduces its libellous attack on Dr. Troy, by adverting to a correspondence between that noble earl and another noble lord then at the head of the law in Ireland, a correspondence which is much misrepresented and distorted, and the reasoning on it highly injurious. Opinions are given in this publication, and illustrated by assumed examples to justify apprehensions of danger from the Roman Catholics, and as far as they are general and in the abstract, I have no privilege to condemn them, however false. Men have a right to argue as they feel upon the policy of yielding to Papists more or less influence in the state; all this is undoubtedly the subject of free and fair discussion, and whatever inconvenience or injustice to individuals may sometimes attend it, yet freedom of discussion ought to be held sacred; to this the world owes its advancement. Perhaps a collision in discordant parts is necessary to bring about a

state of rest and harmony in the end; for that cause we all have an unquestionable right to comment upon the various systems, civil or religious, which distinguish and divide mankind, and to consider their bearings upon our happiness; we have a right to try them, and to publish our opinions on the probable effects of any particular mode of worship or of faith. Nothing like this we question or complain of; our charge is, that instead of this general theory, as it regards all men, the defendant applies the most dangerous principles and conduct to an individual as matter of fact; and this not only without evidence, but contrary to the most positive proof; and he then proceeds to arraign Dr. Troy even upon a subject of opinion which no longer exists, I mean on the danger of French principles.

A change has taken place in the government of France, which had produced a great effect throughout Europe. There is now no false liberty held out to the thoughtless amongst the lower orders of the people, no false lights, no *ignis fatuus* to mislead men to their ruin. We have seen in France all kinds of government, leading to no improvement or stability, and ending at last in a despotism devouring all the rest. The fascination of French principles had necessarily therefore ceased before this libel was published, and can scarcely return in our times. I have only adverted to this

to prove that any hopes of connection with France, by a public profession of her political principles, were at the time in question utterly extinguished, as you will now see from the short history of the case before you.

There was, you know, an extended insurrection, or more properly speaking, a rebellion in Ireland, not of Catholics only, but of Catholics and Protestants united, and which proceeded at last to a height which can not be reflected upon, or stated, without pain and horror. I am sorry to be obliged to recall the remembrance of it. It was a scene of indelible disgrace to its actors, in which the most hideous atrocities were committed, and in which that venerable and excellent person, Lord Kilwarden, who filled the same station on the Bench of justice in Ireland that the noble and learned judge does here, was murdered in the public streets of Dublin. It is a disgusting subject, and I trust the memory of it will pass away, leaving no other trace behind it but the penitence of its perpetrators. At that time, gentlemen, Dr. Troy had a great and just influence over the numerous members of the religion he professes; for how could so much piety and learning not possess it wherever it was known? He thought, therefore, that he might be useful in quelling a spirit which had recently appeared, and which had produced effects so dreadful, by an address to his

Catholic followers, reminding them that they were then resisting a mild and beneficent government, to which they owed a temporal allegiance, but also against their own ancient and apostolic church, which condemned and must punish them. He addressed them, gentlemen, with more zeal and fervor than is, I am sorry to say, always to be found in the preachers of our established church, and with more probability of effect; as it is a well-established fact that the Catholics are more under the influence of their pastors than the Protestants, their flocks regarding them as the representatives of the primitive church. Surely, therefore, Dr. Troy was entitled to the greatest praise for his exertions; and even if his zeal was offensive, it might at least have escaped censure. It was on the very day following that horrid and disgraceful catastrophe in the streets of Dublin that this pious exhortation was communicated to the numerous body of clergy under his direction, having in their turns a most extensive influence, and who immediately published it amongst their numerous and widely-extended flocks, so that its influence may be said to have spread at one and the same moment over the whole Catholic communion in that distracted country.

[Mr. Erskine here read part of the exhortation, dated Dublin, July 24th, 1803, signed by Dr. Troy himself.]

Gentlemen, this pious, benevolent, and patriotic exhortation was circulated, as will appear by the evidence, in the widest possible extent; breathing, as you must feel, the most exalted sentiments; inculcating the love of God, and obedience to the laws, and reprobating violence as contrary to the divine precepts of the holy religion they professed; and so far was he from disconnecting this communication with the government of Ireland as administered at the very period in question, that he makes use of it to strengthen his advice; for such was the mildness of Lord Hardwicke's administration, that Mr. Emmet declared on the scaffold, as Mr. Wickham, now sitting by the Lord Chief Justice, can testify, that the reason for that insurrection being then excited, was, that if not then commenced, it would be too late, as the spirit of disaffection was, from the lenity and justice of the government, declining. Could anything, gentlemen, more strikingly manifest the honest zeal of this reverend minister than availing himself of this crisis in his pious charge, which is without example throughout for its seasonable, eloquent, and fervid spirit. He lays the foundation of it in the religious duty of his followers, and warns them against the miseries of tumult and uproar by a true history of the French revolution, degenerating from specious but false doctrines, destroying all the energies of government, and under the banners of

ignorant and unprincipled leaders, subverting the freedom which so much blood had been shed to obtain; overthrowing and desolating other nations, whilst they were undermining the prosperity of their own. Here, again, gentlemen, I must take the liberty to recite the language of this venerable person, to whose sentiments, without referring to it, I am unable to do justice.

[Here Mr. Erskine read from the exhortation, beginning with "the horrid scenes of last night," and ending with "such is the freedom of that once happy country."]

Gentlemen, if this had been written by any common man, having no influence over others from established pre-eminence or popularity, by a person who until then had been obscure, its truth and justice, the force of its reasoning and its eloquence, would have brought its author into immediate notice. If it had been read even by a beggar in the street, he would have been rewarded as a friend of his country at such a critical period, by a prudent government. Now, if this be so—and it is impossible to deny it—how atrocious is this attack upon him. If to have passed by such merit would have been invidious, how desperately wicked to make it the very foundation of abuse. I have several letters from persons high in office, particularly from Lord

Chichester, late Mr. Pelham, whose absence I lament, in which that distinguished person, then in Ireland, bestows on Dr. Troy's exhortation his valuable applause; for as every word which falls here from his lordship will come with much more force than from us who speak from the bar, so the influence of this reverend gentleman, then a titular archbishop, was sure to be more regarded than if it had proceeded from an inferior source; it came from an eminent man to an admiring multitude; not from an author to his equals, but from a pious pastor to an enthusiastic flock; and it is not surely for this libeler, after his charges against the Catholics, to deny that the higher priests of their communion have a most powerful influence over their inferior clergy, as these have, in their turns, over the people. It follows, therefore, that he must be driven to admit that the influence of Dr. Troy's precept was in proportion to his eminence amongst those to whom it was addressed. Every thing that came from his pen, the defendant can not but acknowledge, had the sanction of high and regular authority, and was sure to be attended to with conviction and respect.

To judge of its merits, let us consider the probable results of an effort to a contrary effect. Suppose, instead of this pious exhortation, he had held out that there were many things in the new government of France well worthy of our imita-

tion. That taxes in England were heavier and more numerous, and that we had deviated in many respects from those wise principles of our ancestors, by which our country had arisen to such an eminence amongst the nations of the earth. If he had written this, so obviously calculated to alienate affection from the state, would he not have been subject to an indictment? And shall he not then, when in the hour of danger he exerted all his faculties and influence to rouse the spirit of those under his direction to inculcate obedience to God and loyalty to the King, recalling the disaffected to the temper and disposition of faithful subjects, shall he not be protected by the laws of this mighty and united empire? Shall he for acts the most meritorious be the victim of malicious and unpunished defamation? Shall this be the reward of a man who, for the purpose of quelling a rebellion, thus seasonably addressed his country?

[Here other parts of the exhortation were referred to by Mr. Erskine.]

Gentlemen, as soon as the exhortation was penned by Dr. Troy, it was printed, published, and extensively circulated, and great public benefit attended it. Lord Fingal, who now sits on the bench by Lord Ellenborough, a person of great rank in Ireland, eminent from his talents and

respected for his virtues, feeling the great advantages which had followed from it, and which it was likely further to produce, alluded to it in a correspondence between himself and the noble person, then at the head of the law in that country. Of the exhortation itself, you have now full knowledge, and have only to look at the return he received for it. The author of this libel begins thus: "Nothing affords such strong evidences of popish dissimulation in Ireland as the exhortations of the Romish clergy and the loyal addresses of their flocks. They have been commonly found to be sure presages of a deep-laid conspiracy against the Protestant state; and after it has exploded in rebellion, their clergy generally lament, from the altar, the delusions of the people, and their treasonable conduct toward the best of Sovereigns, and the only constitution that affords any degree of rational liberty, though, from the nature of their religion, they must have known, and might have prevented it."

Now, if the libel had stopped here, though I should have considered the author as an enemy to the public peace and security by so gross an insult to the Catholics of Ireland; though at that alarming crisis it was wicked to agitate them by attacking their tenets and reviling their priests; yet Dr. Troy could not have appeared as a plaintiff before you; but he advances afterwards to Dr. Troy, a

an individual, and publishes that he must personally have known all the circumstances which preceded the insurrection in Dublin on the day before the date of the exhortation, yet that with treasonable misprision he did not put government on its guard, and that the administration was convinced of his treachery.

“The dreadful rebellion of 1798, accompanied by such instances of popish perfidy, must convince the reader that no reliance is to be placed on the oaths or professions of Irish Papists to a Protestant state. Dr. Troy must have known all the circumstances which preceded the insurrection in Dublin on the 23d of July, 1803, and yet he did not put government on their guard. The present administration are convinced of his treachery on that occasion, and yet for many years past, he had been treated at the castle with the utmost respect, and had even received favors for some persons of his own family. His exhortation, then, to which Lord Fingal alludes, must be considered as a mockery of the state—an insult to the understandings of his Protestant fellow subjects, and an unquestionable testimony of his want of candor.”

Now, gentlemen, I ask you, what compensation ought to be made to Dr. Troy, which you are upon your oaths to decide, for a calumny of this atrocious description, which the malignity of a demon could only invent, and which, not having attempted to

justify it as the truth, Mr. Symonds admits to be willfully false? What, indeed, can be more atrocious than to impute to a minister of religion, in an hour of national peril, that he had secretly fomented rebellion with an exhortation cut and dry to deprecate and lament it afterwards? If I had to portray a fiend of the most horrible and disgusting description, I should describe him as this libel represents Dr. Troy; as aware of impending treason, but traitorously concealing it, and after its murderous perpetrations, employing the hallowed office of the priesthood to condemn it. This is the slander of which the plaintiff complains, and on the subject of damages you have only to ask yourselves this question: What would you yourselves expect from a jury, if you were thus traduced, and obliged to come from a remote part of the empire to vindicate your reputations? Whatever you feel in such a case were it your own, gives the rule for what your verdict ought to be. However he may be a sufferer from the trial being here, and not in Ireland, where he is universally known and respected, yet he has the satisfaction of submitting his case to a tribunal aloof from all those animosities which have locally prevailed in Ireland, confident that in the centre of this united empire he will receive that justice of which the example is so essential to extend its influence.

You will prove by your judgment that though other states and kingdoms may enjoy advantages in the natural world which we do not possess, yet that in the moral world we are superior to them all ; and as this is the first case in which a Catholic clergyman appeals from one part of the empire to a Protestant tribunal in another, you will distinguish it also by the purity of the decision.

Gentlemen, I conclude with expressing my acknowledgment for the attention I have received from the court. One thing, however, had nearly escaped me, which I wish not to pass over without further notice, as in the commencement of my address I only alluded to it. Though this is, as I have just said, the cause of a Catholic priest before a Protestant tribunal, yet remember that it has no manner of concern with the great question of state so often and so lately agitated in the public councils. The Catholics are convinced of the justice of their claims, to fill all the offices of the government to which other subjects are eligible, but they claim them only as subjects from the state. They desire to be obedient to the laws, and submit to their condition, until the laws shall in their favor be changed, which they confidently hope is an event close at hand, and I hope so also. It is not only a natural wish in a Catholic, but a duty to the faith he professes, to watch every occasion of renewing his claim to be placed upon

the same footing with other subjects, whilst he subscribes to all the civil institutions of the realm.

The trial resulted in a verdict for the plaintiff, damages fifty pounds. In the case of *Troy v. Hales*, for the same libel, Mr. Erskine signified that the plaintiff would be satisfied with nominal damages, and his costs. A verdict for one shilling was accordingly entered.

LORD ERSKINE'S SPEECH
IN THE CASE OF
THE EARLDOM OF BANBURY.

DELIVERED IN A COMMITTEE OF PRIVILEGES OF THE
HOUSE OF LORDS.

Lord Erskine's speech in the case of the Earldom of Banbury, though delivered in the House of Lords many years after his retirement from the bar, may not inappropriately find place among his legal arguments, since it was upon a purely legal question. The case arose upon the claim of Lieutenant-Colonel Knollys to the Earldom of Banbury. The first Earl of Banbury, William Knollys, when a very old man, married Lady Elizabeth Howard, a girl of nineteen, who numbered among her lovers the young Lord Vaux. While often in his society she twice became pregnant, and was delivered of two sons; in each case, however, concealing the fact of pregnancy, and the subsequent fact of birth, from her husband. The Earl dying soon after, she became the wife of Lord Vaux, and the two children were given that name, and were treated as the children of Lord Vaux. The old Earl was generally considered to have died childless, and in his will no mention was made of any son. A patent of precedence was granted him by the House of Lords shortly before his death, on the solicitation of Charles I, who spoke of him as childless, and an inquisition taken after his death found that he died without heirs male of his body.

At different times efforts were made by the sons and their descendants to obtain recognition of their claim to

the title. Edward, the elder son, was found, under a commission from the Court of Wards, to be the son and heir of the earl, upon the strength of which finding he assumed the title, but was killed abroad before attaining his majority. The younger son, Nicholas, then assumed the title, and was allowed to sit as Earl of Banbury in the convention parliament of 1660, though not summoned to the succeeding parliament. Notwithstanding the report of a committee of privileges in his favor, a writ was still refused him, by the advice of the Attorney-General, and he was never allowed to take his seat. His son, Charles, was also excluded, but being indicted for murder, he petitioned the House of Lords that he might be tried as a peer, which privilege they denied him. He then pleaded his peerage in abatement, and the plea was admitted by Chief Justice Holt. His descendants still continued to call themselves, and to be called, Earls of Banbury, though they were not recognized by the House of Lords, and no further claim was made for their recognition until the case of the Lieutenant-Colonel Knollys.

Lord Erskine, from the fact of the claimant being his personal friend, took a warm interest in the case, and being convinced that the claim was just, made a strong argument in its support. Though unsuccessful, as the result proved, this argument is of especial interest, as showing the unimpaired intellect of its author, notwithstanding a dozen years of relaxation and comparative rest. Lord Campbell says: "I am in possession of his MSS., connected with this case, which show, in a very striking manner, the industry he could still, when necessary, call into action. These contain full notes of all the argument at the bar, an abstract of all the facts of the case, a collection of all the authorities upon legitimacy, his long speech in support of the claim, and his elaborate protest against the decision."

MR. ERSKINE.


Notwithstanding all that has been urged by the noble and learned lords opposite, I adhere to the opinion I expressed at an early period of this debate. I admit that the claimant labors under great disadvantage. The facts involved in his case are extraordinary, and the grave has long since closed over all the individuals whose evidence could afford him any assistance. His claim is almost as old as the patent of his ancestor, and successive generations have passed away without a recognition of it by this House. Yet time would be the instrument of injustice if it operated to raise any legal bar to the claimant's right. Questions of peerage are not fettered by the rules of law that prescribe the limitations of actions, and it is one of the brightest privileges of our order that we transmit to our descendants a title to the honors we have inherited or earned, which is incapable either of alienation or surrender. But I will go further, and assert that lapse of time ought not in any way to prejudice the claimant, for what laches can be imputed in a case where there has been continual claim? Nicholas, the second Earl of Banbury, presented his petition as soon as there was a Monarch on the throne to receive it, and a

series of claims have been kept up by his issue to the present hour.

It appears to me of the first importance, that the law by which this case is to be decided should be accurately laid down. The facts of the case are only of importance with reference to the law, and any conclusion that may be drawn from them, which is not applicable to the law, is equally idle and irrelevant. If a former committee endeavored in their resolutions on this claim to distinguish the law from the fact, they can not be too severely censured, as nothing could be more opposed to justice than such a distinction. Legitimacy in law and legitimacy in fact can not be at variance; they are in every respect identical, and the apparent ground of distinction between them originates in an erroneous notion of the idea they purpose to convey. Legitimacy is the creature of law, and the term has no other meaning than that which is affixed to it by law. It is the designation of a particular status, the qualities of which have been enumerated and defined by law, as best adapted to preserve the order and security of society. When a question of legitimacy arises, and the claimant has proved the facts which constitute his legal title, whatever suspicions may exist to the contrary, the verdict must be given in his favor. These facts may be very far from convincing the judge that the claimant was actually begotten by

his ostensible father; yet the judge has no alternative, for the claimant has fulfilled the conditions prescribed by the law. The province of the judge has been circumscribed by the lawgiver, and it would be a breach of his duty were he to extend his inquiry beyond the limits within which the question is confined.


The rules relating to the bastardy of children born in wedlock may be reduced to a single point, *i. e.*, that the presumption in favor of the legitimacy of the child must stand until the contrary be proved, by the impossibility of the husband being the father; and this impossibility must arise either from his physical inability, or from non-access. It has been urged that strong improbability is sufficient, but this I confidently deny. We do not sit here to balance probabilities on such a topic as this. We must not forget that the real matter in controversy is of a very peculiar nature. Suppose two horses and one mare in the same pasture ground, and no other horse could obtain access. The mare foals. If it were a question of property to ascertain by which horse the foal had been begotten, the party would succeed that could show the greater number of probabilities in its favor. The color, the shape of the foal, and whether the mare had been with one horse more than with another, would come into consideration. But it is not so with the human species. We stand on a



higher ground. The obligation and contract of marriage being the source and fountain of all social ties, the law feels itself bound to give confidence to persons so connected, and rejects the imputation of a breach of contract, unless it be proved in either of the ways above mentioned. The coverture creates the presumption of access, and access is synonymous with sexual intercourse, except in the cases of physical inability. It is vain to say that the presumption of sexual intercourse ought to yield to evidence which shows the fact to be highly improbable. The fact is a necessary concomitant to the status, therefore the presumption would be incontrovertible, unless certain exceptions to it had been created by law. A presumption, as long as it stands, is equivalent to proof; indeed proof is nothing more than a presumption of the highest order. Even the physical inability, by which the presumption of sexual intercourse may be encountered, is only a simple presumption. I can not contemplate a case where physical inability can be made the subject of demonstration. Men of science, from their observations on the human body, may be able to satisfy their minds of the existence of the physical inability, but in our inquiry into it we must go by the ordinary rules of nature. An infant of seven years of age was lately exhibited that apparently possessed the powers and capacity of manhood; but if this mon-

ster had been married, would the issue of his wife have been held legitimate, in opposition to the established presumption of law with reference to infants of that age? Unquestionably the presumption would prevail. A chain of evidence may be perfect though every link of it is not equally perceptible. In murder, you must prove generally how the deceased came by his death, as by poison; but it is not necessary to give evidence of his having drunk the draught; so in arson, it is not necessary to see the torch put to the dwelling. Having laid down these rules, which the law has established for the protection of this very helpless class of the human race, I take it upon me to say, that to make a child that is born in wedlock legitimate, there is no necessity to prove actual intercourse; for legitimacy is the inevitable result of access, save where the law has established certain exceptions. These principles are unshaken, and while they remain so, the exceptions, which rest on the same grounds, can not be extended.

The nature of the presumption arising from the access of the husband being ascertained, it is evident that if access can be proved, the inference from it is irresistible, whatever moral probability may exist of the adulterer being the father; whatever suspicions may arise from the conduct of the wife, or the situation of the family, the issue must be legitimate. Such is the law of the land.



Women are not shut up here, as in the eastern world, and the presumption of their virtue is inseparable from their liberty. If the presumption was once overthrown, the field would be laid open to unlimited inquiries into the privacy of domestic life; no man's legitimacy would be secure, and the law would be accessory to the perpetration of every species of imposture and iniquity.

The civil law regards the presumption arising from access as insurmountable, except on proof of physical inability. Our law fully supports the principles I have laid down. The rule is not only given by Lord Coke, but by succeeding writers. In the case of *Hospell v. Collins*, Lord Hale held that the issue to the jury was confined to the question of access. In *Pendrell v. Pendrell*, the sole subject of discussion was the access. It was proved that the husband and wife had lived apart, that, in fact, the presumption of access could be met by proof of non-access. In the case of *Thompson v. Saul*, in which I was counsel, the evidence against the legitimacy was not confined to the reputation of three generations to the adultery of the wife, and to the treatment of the child. The great point was the non-access. The husband lived in Norwich, and the wife in London, and the other circumstances all tended to controvert the access. It was strictly a case of non-access.

Mr. Beachcroft has furnished me with an accu-

rate account of a trial which lately took place at Welshpool, in which the sole question was the legitimacy of a child named Lloyd. The husband was a lunatic; the wife lived in adultery with a Mr. Price, who was proved to have slept with her at the time when the issue was supposed to have been generated. The counsel dwelt strongly on the state of the husband and the adulterous intercourse of the wife. But there was no proof of non-access, and it was imperative on the jury to find for the legitimacy.

The same doctrine was followed by Lord Ellenborough in the case of *Boughton v. Boughton*. It is a case almost parallel to the present. In the year 1774, Salome Kay, the wife of a person in very humble life, left her husband and became the mistress of Sir Edward Boughton. From that time she continued to live under the protection and wholly at the expense of Sir Edward, and she ceased to hold any intercourse with her husband, or to bear his name, having resumed that of Davis, which was her maiden name. In March, 1778, she was delivered of a girl, who was baptized and registered by the name of "Eliza, daughter of William and Salome Davis," (William Davis, the brother of the mother, being a servant of Sir Edward Boughton). Sir Edward brought up and educated Eliza Davis as his child, and by his will, dated on the 26th of January, 1794, he devised

considerable estates to her, by the description of his daughter Eliza, for her life, and after her decease, to the heirs of her body in tail general, provided she married with the consent of her guardians, and the husband she married should take upon him the name of Boughton. After the death of Sir Edward, in 1798, Miss Davis, being still an infant, presented a petition to the chancellor, stating that she was about to intermarry with Colonel Braithwayte; and as her guardians were not competent to consent to her marriage, she being an illegitimate child, she prayed that Ann E., and Richard S., might be appointed her guardians, to consent to her marriage. The chancellor, by an order, dated the 9th day of August, 1798, granted the prayer of the petition; the guardians were appointed, and the marriage solemnized by license. Doubts were afterwards raised on the legality of the marriage, upon the ground that Miss Davis could not be considered an illegitimate child, Mr. Kay, the husband of her mother, having been alive at her birth, and therefore her legal father, and the only person qualified to consent to her marriage. The Court of Chancery directed an issue to ascertain whether the marriage was legal, and the Court of King's Bench decided that it was not. The only question in the case was the illegitimacy of Miss Davis, and stronger circumstantial evidence of that fact could not perhaps be brought

forward in a case of this description. The separation of the husband and wife, the intercourse of the latter with Sir Edward Boughton, and the recognition of the child by that gentleman, were fully established. The baptismal register, the conduct of the mother, the reputation of the world, and the proceedings in chancery, marked her as an illegitimate child. The single circumstance of the mother's husband being alive was all that could be urged to the contrary. The legal presumption, in favor of legitimacy, wrung a verdict from the jury, which no one can doubt they would gladly have withheld.

From these principles, supported by these cases, I infer that without proof of non-access, the presumption derivable from access must be conclusive.

Such is the law of England, as it existed from early times to the present hour. I am not here to defend the law, but to administer it. Perhaps the lawgiver may have laid down a rule not always infallible; he may in some instances have diverted hereditary wealth from its proper channel by enriching the fruit of an adulterous intercourse; and he may thus have created the relation of parent and child where it had no real existence. In my opinion these occasional and very rare deviations from justice amount to nothing more than the price which every member of the community may be called upon to pay for the privilege of an en-

lightened code. No laws can be framed sufficiently comprehensive to embrace the infinite varieties of human action; and the labors of the lawgiver must be confined to the development of those principles which constitute the support and security of society. He views a man with reference to the general good, and to that alone. He legislates for men in general, and not for particular cases. No one can doubt that the interests of society are best consulted by making a question of such frequent occurrence as legitimacy to rest on a limited number of distinct facts, easy to be proved, but not to be counterfeited, instead of leaving it to be the result of inference from a series of independent facts, separately trifling, and only of importance collectively from the object to which they are applied. Marriage and cohabitation afford us a more sure solution of the question of legitimacy than we could arrive at by any reasoning on the conduct of the husband and wife. The conduct of Lord and Lady Banbury may be satisfactorily accounted for by the supposition that Nicholas was considered illegitimate by his mother; but if she cohabited with Lord Banbury at the time of the conception, she may have been mistaken in her judgment of the father to whom she assigned the child; and it would be monstrous that the status of any individual should be left to the determination of the very party who is expressly disqual-

ified by law from giving any evidence on the subject.

This was the policy of the law ; and when it appeared to be manifestly unjust in an individual case, the legislature interposed by a special act, the effect of which was confined to the party who was the object of it. Several of these acts may be found on the records of this house ; but none of them were passed, except under circumstances which left no doubt that the husband was not the father of the child proposed to be bastardized. I need not observe that these acts are not declaratory of the law ; they create exceptions from the law, otherwise they would have been unconstitutional encroachments upon the functions of the ordinary courts of justice, and an abuse of the jurisdiction of the house. A rule is often ascertained by knowing the exceptions to it. These acts constitute an unanswerable argument to show that had the legitimacy of Nicholas labored under even more serious imputations than have been raised against it, the law would still have protected it ; and nothing short of the special interposition of the legislature was capable of invalidating it. The act passed to bastardize the children of Lady de Roos expressly mentions that the said Lady Ann had left her husband's house, and lived in notorious adultery, and had been delivered of three male children, which children thus notori-



ously begotten in open adultery, "by the laws of this realm are or may be accounted legitimate," etc. Who can say, in opposition to such a declaration of the law in act of Parliament, that Nicholas, who was born when his mother, far from having abandoned her husband, was living upon the most affectionate terms with him, ought to be accounted illegitimate? Indeed the very bill which was read to bastardize Nicholas recites, that he was born under circumstances that make him legitimate; a recital which is fully confirmed by the recitals in former acts, of a similar description, and by the authority of every case in which, either before or since, the same question has been brought under the consideration of a legal tribunal.

I admit that the presumption of access may be combated by proof of impotency; but what evidence is there of Lord Banbury having been impotent? There is no statute of limitations on the powers and faculties of man. Instances of robust longevity might be cited still more extraordinary. Sir Stephen Fox married at the age of seventy-seven, and had four children. The first child was born when the father was seventy-eight, the second and third were twins, in the following year, and the fourth was born when the father was eighty-one. The Earl of Ilchester and Lord Holland can vouch for the accuracy of this statement, and I believe their genealogy has stood hitherto un-

questioned. Parr became a father when even his son was of a more advanced age than Lord Banbury. Moreover his lordship seems to have kept all his faculties both of body and mind in full exercise. Not only does it appear, from the evidence of one of the witnesses, that he went out hawking up to his death; but the journals of the House furnish us with the best evidence of his attention to more important matters. There are several entries, about 1627, of excuses for the absence of peers, but Lord Banbury's name does not occur amongst them; and when the practice of noting peers who were present, by prefixing the letter *c* to their names, was resumed in 1628-9, I find that the Earl of Banbury is so distinguished on the 21st of January, and appointed on a committee for the bill to preserve His Majesty's revenue. On the 20th of February he is appointed on a committee for the defence of the kingdom, and he appears to have been in his place on every other day during the session, except once or twice, when his absence is accounted for by sickness. The Parliament was dissolved on the 10th of March, and no other called for twelve years; in the meantime he died.

I shall not travel through the various acts of Lord Banbury's life, from which it has been inferred that the birth of these children was concealed from him. The instances of human caprice and

infatuation that pass daily before our eyes, lead me to regard this conclusion as more specious than correct. It is an abuse of reasoning to apply it to such a case as this, for we are not to infer that certain acts were done because they ought to have been done. We must observe also that the acts of Lord Banbury all prove that his fondness for his wife, and his intercourse with her, continued up to the hour of his death. If they lead to an inference of non-access in one view, they destroy it in the other. The concealment of Lady Banbury's pregnancy is perfectly consistent with the existence of the access, and even of the sexual intercourse. One fact, however, has been overlooked, which somewhat relieves her ladyship from this imputation. She appeared, along with Lord Banbury in open court, for the purpose of levying a fine of Caversham, only a few months before the birth of Nicholas, when her pregnancy could scarcely have been overlooked by her husband.

I do not attach much weight to either of the inquisitions; they were *ex parte* proceedings in an inferior court, liable to be quashed or superseded at any subsequent time. There are instances of a series of inquisitions, alternately establishing and controverting the same fact; and no one can examine the records without being satisfied that they constitute evidence of a very secondary

description, which has deservedly fallen into disrepute.

The evidence received by the committee in 1661 has been treated by some of the noble lords with great severity. Due allowance has not been made for the imperfect state in which it has come down to us. Neither the questions nor the answers are fully reported; for instance, Ann Delavall is reported to say, that "she knoweth him to be the son of William Earl of Banbury, being present at his birth;" and in a subsequent answer to the question whether Earl William saw the child, she says, "I was not there to know it." Now it is evident that the first answer referred to the birth of Edward, and not of Nicholas. She was probably interrogated respecting both the children in the order of their birth. If she had referred to Nicholas instead of William, it would have been unnecessary to say Nicholas Earl of Banbury, in her answer to the second question; she would have said "him," as she does in her answer to the first question. I may add that the word "Edward" is at the end of the line which precedes her examination, as if he was the subject of her examination. With this key the whole of the evidence is consistent and satisfactory. The woman had been present at the birth of the eldest son, and her connection with the family being altered before the birth of his brother, she only

knew of the birth of the latter by report, though she could speak positively of his being regarded by Lord Banbury as his child. Mary Ogden was his nurse for fifteen months, but it does not appear from how soon after his birth. She does not know whether Lord Banbury ever saw him. But when it is considered that we are ignorant whether she was his wet-nurse, and whether Lady Banbury might not have been jealous of her interference, it would be bold to assume that Lord Banbury could not have seen the child without her knowledge. The evidence of Ann Read requires large interpolations to make it intelligible. The last two answers are obviously in the wrong order. Edward Wilkinson was called to speak to the facts subsequent to Lord Banbury's decease, and having never known Nicholas until that time, there is nothing extraordinary in his ignorance whether Lord Banbury knew that he left any issue. I really can not partake of the skepticism which has been expressed by some noble lords respecting this evidence, and I am confident that had the whole of it been preserved, their impression would have been very different. The facts deposed are conclusive, unless you impeach the veracity of the witnesses. The cohabitation of Lord and Lady Banbury, the birth of the child, his recognition by Lord Banbury, are all fully established. The counsel might safely say, as

they did, that they had cleared the title. It is true Lady Salisbury was not called, but she was summoned, and her absence can not be construed into an imputation against the title of Nicholas, as her husband was his next friend in the suit instituted in chancery, for perpetuating the evidence in his favor. The servants were more likely to know what passed in the family upon such an occasion, than persons of a higher station; and it argues no small confidence in his cause, that the claimant should bring them forward. The questions addressed to these witnesses came from the Attorney-General, and it was his duty to elicit the truth, and present it to the House in such a shape as to admit of no misconstructions. An examination conducted under his auspices ought to be regarded strictly, and no facts should be established by way of inference, when they might have appeared on the face of the examination itself. If the House wanted further evidence, why did they not call for it, for they had the power and opportunity of doing so? More than twenty individuals were then alive competent to prove what was the general reputation in the family, and in the world. The register of baptism, indeed, never existed, as Lady Banbury was a Catholic, and her child was probably christened in private by a priest of her own persuasion.

I do not mean to contend for the immaculate

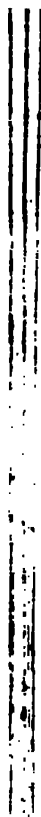
virtue of Lady Banbury. She may have sinned with Lord Vaux and fifty other lords; but if her intrigues were carried on at the time she cohabited with her husband, the legitimacy of her child is unblemished. She evidently was a very imprudent woman; and scandal may have been busy with her fame, both before and after Lord Banbury's decease. Her early marriage with Lord Vaux must have deeply prejudiced her son in public estimation, and it may have deterred him from taking those steps for the recovery of his property, which would obviously have been beneficial to him. Lady Banbury had certainly never been convicted of an adulterous intercourse with Lord Vaux, and she might have dreaded an exposure, which would have deprived her of her station in society. The provision made by Lord Vaux for Nicholas must have been an additional consideration for his abstaining from a step which would probably have been fatal to the peace of that nobleman, as well as of Lady Banbury. It must not be overlooked, that so far was Nicholas from being in affluent circumstances, he was a very distressed man.

These are not the only parts of the conduct of Nicholas which have been brought forward by the adversaries of the claim. He has been traced from his cradle to his grave, and every period of his life has been scrutinized in order to procure

evidence of his illegitimacy. The dim twilight of two centuries has gathered round the events of his obscure career, and prevents us from forming a correct estimate of either their intrinsic or relative importance. If, indeed, we could transport ourselves to the troubled times in which he lived, we might venture to draw inferences from the vicissitudes of his domestic history ; but it is now become a most fallacious experiment. Why is the bounty of Lord Vaux to his step-son to be ascribed to another motive than what belonged to such a relationship ? Why is it to be assumed that he has repudiated the title of Banbury, because he had been called in his earliest childhood by the name of Vaux ? Why should it not, with equal justice, be assumed that his legitimacy was fully acknowledged, because in the license to travel given to his mother by the Protector, the terms are, "to Lady Banbury and her son," the natural description of a widow and her infant ; and because, in the leave of absence granted to Nicholas by the House, as well as in the act passed for the sale of Boughton Latimer, Nicholas is mentioned as Earl of Banbury ; and on various trials of property in which he was concerned he always received the same title ? These are weak arms to encounter a presumption so strong as that which exists in favor of legitimacy. It would have been most unjust, upon such slight grounds, to pass a special act to

bastardize the child ; and attempts of this description have failed when they were much better supported. One case occurred highly encouraging to him in the very Parliament to which he submitted his claim, and there can be no doubt that the act introduced to bastardize him was withdrawn upon the first reading, from the disapprobation naturally excited by so harsh and unjust an exercise of power.

I trust, my lords, that I have established that the opinion of the law entertained by the committee in 1661 was well founded, and that Nicholas, the original claimant, ought to have been admitted to the full enjoyment of the privileges of this earldom. The same rights have descended to the present petitioner, and I trust they will be recognized by your lordships.



SPECIMENS
OF
LORD ERSKINE'S PARLIAMENTARY
SPEECHES.



DEBATE IN THE HOUSE OF COMMONS
ON THE ABATEMENT OF THE
IMPEACHMENT OF WARREN HASTINGS,
BY A DISSOLUTION OF PARLIAMENT.

December 17th, 1790.

Mr. Erskine, after complimenting Mr. Burke on the wit and eloquence of his speech, said :

If it were my purpose to endeavor by argument to negative the resolution proposed by the right honorable gentleman, I should better know my station than to present myself to the House in the very front of the debate. I should have contented myself with supporting my opinion, whatever it might ultimately be, in some later stage of the argument, after its foundations had been laid by persons of greater parliamentary experience, and possessed of more leisure to investigate so complicated a subject, and of such infinite magnitude and importance. I can, therefore, assure the House that it is from an unfeigned sense of my own inability and want of preparation, when compared with the difficulty and probable consequences of the business we are engaged in, that

leads me to offer myself to the chairman's notice before the discussion has been advanced in, in order the more seasonably to suggest the propriety of deferring the decision, and appointing a committee to search for precedents on the subject; by which course alone an assembly so very popular can come to a decision with the precision necessary on such a momentous occasion, and consistently with that dignity which they ought always to preserve in the eyes of the public which they represent.

It is the invariable practice of both Houses of Parliament to search for precedents on all subjects of deliberation, where the resolutions of either House may be expected to guide or influence the decision; and that mode has recently been adopted almost as of course, on a subject of the greatest concern indeed, but not of greater novelty and difficulty than the present. I am further prompted to the motion I mean to make, for searching precedents by the language of the right honorable gentleman who moved the resolution; for though, for the reasons assigned by him, he did not detail the principles or precedents on which his resolution was founded, yet he informed the House that he had sought its foundation in every extant record and history, and had collected the information of every mind capable of adding new lights to his own upon the subject. These were, indeed,

necessary preparatives; but it should be remembered that if they exist, as I have no doubt they do, with the right honorable gentleman who framed the motion, they are equally necessary for the members of the House who are to decide upon it. Minds with such lights and information as belong to the right honorable mover, few, indeed, if any, could boast of; but that reflection rather adds to the propriety of suffering others to collect materials for judgment, and to obtain time for deliberation.

In reflecting on the fittest mode of endeavoring to convince the House of the expediency of appointing the committee which I shall move for, a dilemma presents itself. If, on the one hand, I should rest the fitness of my proposition on general observations, without investigating the precedents which create the doubts and difficulties of the question, I might fail in impressing the House that any doubts or difficulties exist; and if, in avoiding that failure, I should enter at large into the precedents I have examined, it might be objected to me that I have myself exhibited the materials which I am praying leisure to collect. I shall, however, pursue the last as the properest course, not thinking that my particular possession of the precedents will remove the necessity of a committee to search for them; for how can the House take my collection, without examination,

to be authentic, or be sure there are not many others behind which are still unexamined and unknown.

Much of the debate may, besides, turn on the classing and recollecting and comparing of dates, and upon a critical examination of the very wording of the different authorities and resolutions, which no human mind can any where manage without notes of them, far less in the collision of such a debate in an assembly so numerous and fluctuating as the House of Commons.

Before, however, I have recourse to the few precedents I have seen on the subject, a great preliminary question presents itself: on the due consideration of which, all their validity undoubtedly must depend, viz., by what rule, and upon what principles the subject is to be investigated; or, to speak more plainly, is it a question of privilege to be decided by expediency, or a question of law to be determined by rule? No man prizes more highly the privileges of the Commons than myself; my short political existence in a former Parliament was begun and ended in a struggle to preserve them; I maintained them under the auspices of my most excellent friend near me (Mr. Fox,) and I return to my seat again with the same principles. But the question now before the House is, in my mind, totally foreign to every principle of privilege. It appears to me to be a pure question of law, and



which the rules of law can consequently alone determine. It is to give to all the subjects of England, under the fixed standard of the law, the possession of life, property, freedom, and reputation: by this all the privileges of the House of Commons have been for ages directed; by these privileges, the rights, and liberties of the subject have been, one after another, maintained and enacted into law, in different ages of our history; and God forbid that after they have been thus gloriously fought for by our patriot ancestors in that place, they should be at once set loose again by the House in the meridian of its authority, giving law to a court of justice, and dictating the state of its own prosecution to those judges appointed by the constitution to decide it.

The objection I have to the resolution is, that it appears to me to be judicial. If the motion had been for the appointment of managers, on the principle that the House would not entertain doubts of the existence of its own prosecution, but would consider the continuance of it as of course, leaving the Lords to decide on it as a matter of judicature, much less objection could have been taken to that course of proceeding; but the resolution seems to pre-suppose doubts of the continuance that have never been stirred, and quiets them by a resolution that the impeachment is now pending. This seems not only the assumption of judicial authority,

but a declaration which may pledge the House to give it more than judicial effect. My apprehension is, not the consequence of any loss of privilege by a difference with the peers, an apprehension vain and unfounded, but I think that the Commons of Great Britain, by the weight of their high privileges, should rather be anxious to uphold the course of law, and give support to the balance of the state, than to exert them against the one or the other.

I will now proceed to lay the foundations of my argument, by maintaining that the present state of the impeachment, be it what it may, is a pure question of law; to be decided by the House of Lords, sitting as a court of impeachment on the inquisition of the Commons; a court, to all intents and purposes, as much an English court of criminal law, as the court of the King's bench, or the quarter sessions of any county in the Kingdom. It is impossible to deny this, without insisting that the Magna Charta of the Kingdom and the thirty statutes confirmatory of it, are all repealed: or at least, that though existing for subordinate purposes, they can, in the present instance, be made to bend to the will of one branch of the legislature. The first struggles of our ancestors were to fix deeply and immoveably the root of all sound and rational liberty, by bringing justice, criminal and civil, to a precise standard: arbitrary, anomalous proceed-

ings, by which the subject was questioned before jurisdictions not defined by law, and exposed to trials and judgments ascertained by no legal standard, were the great vice of the ancient government of England : and the grievance which first called forth the spirit and wisdom of the founders of the constitution to put an end to these worst of evils, and to bring the enjoyment of life, property, and liberty, within the plain, unequivocal protection of positive law, was the very object of the *Magna Charta*, and was amply secured by the twenty-ninth chapter, which enacts, that no man shall be taken, or imprisoned, or deprived of any property, privilege, or franchise, but by the judgment of his equals, or the law of the land. Under such alternative, therefore, every English trial must be had ; a jury of equals must decide in all cases on the life or person of any English commoner, unless where there are exceptions by immemorial custom, or positive statute ; in other words, by the law of the land.

The trial by impeachment is one of these exceptions, and its only foundation must therefore be English law, and consequently the course of proceeding under it can never be changed or abrogated by a resolution of the House of Commons, but must be changed alone by the entire legislature of the kingdom. This sacred security of the English government the *Magna Charta* first estab-

lished; and its thirty confirmatory statutes, with their strong, deep, and intertwined roots, bound fast the spreading tree of our liberties, often shaken, indeed, but never loosened, by the contending tempests of ages; and the House of Commons has ever stood as a fence round it, and planted new laws for its shelter and preservation. The trial by impeachment, established by the most ancient usage, is unquestionably an institution necessary for the preservation even of the laws themselves, and all the securities of the government; but it was instituted by the same cautious wisdom, and tempered with that just and benevolent spirit which so peculiarly characterizes English jurisprudence. In times when the power of the Crown and its subordinate executive magistrates would, without due check, have laid waste all the rights of the subject, and when even the judges of the law were but too often the subordinate engines of oppression, it became necessary to provide a tribunal where criminals could be questioned, whose authority or means of corruption might overawe or seduce the ordinary courts and ministers of justice. But though spurred on by necessity, no less than the support, or rather the existence of infant popular rights struggling in ancient times for self-preservation, but now established beyond fear or danger, even then mark the wisdom and providence of the founders of the con-

stitution ; they did not forget the safety of the criminal, even in providing for the superior safety of the state. When they conferred an inquisitorial jurisdiction on one branch of the legislature, they recollected the overruling influence and authority of such an accuser, and therefore conferred the power of judicature upon a co-equal branch of the government, which, from being superior to awe or influence, actuated by different interests, and divided by dissimilar prejudices, was likely to hold even the balance of this necessary and superior court of justice. By this mode of considering the subject (and it was so considered by Mr. Justice Blackstone, and every other writer of authority), the trial by impeachment stands harmoniously consistent with the entire constitution, and with all the analogies of law. By this mode of considering it, it can alone be reconciled with Magna Charta ; for though the party impeached was not tried indeed by his equals, because his equals are his accusers, yet he is still tried by the law of the land, the alternative in the wording of the statute, which he could not be if an impeachment were not a branch of the established criminal justice of England.

Besides this legal proceeding by impeachment before the peers of the realm, as a court of criminal law, it will appear, by an inspection of the ancient records of Parliament, many of which I

have examined, as collected by Lord Chief Justice Hale, in a manuscript printed by Mr. Hargrave, but not published, that the Lords anciently drew Commoners before them on the accusation of individuals, contrary to Magna Charta, and the various confirmatory statutes; that repeated complaints were made of these abuses by the Commons, and that at last they were declared to be utterly void, and were formally abolished by the statute, 1st of Henry IV., Chap. 14th. The Lords, however, for some time, seemed to have disregarded the statute, till upon a private impeachment of Lord Clarendon by Lord Bristol, the House of Lords referred the question to the judges, who declared such a proceeding, on the accusation of an individual, to be contrary to law, coming, as Lord Hale expressed it, in the 91st page of the work alluded to, within the 29th chapter of Magna Charta. "*Nec super eum ibimus, nec super eum ponemus.*" Lord Hale added, that from that time an impeachment by the Commons of Great Britain was the only case in which a Commoner could be subjected by law to the judicature of the peers. Assuming, then, an impeachment to be a legal prosecution, on the accusation of the Commons before the Lord's House, can it be any longer a question, by which of the two Houses every matter that the accused has a direct interest in for his preservation, shall be adjudged? Common sense and

common justice equally revolt at a judgment affecting the accused, delivered by the accuser. The court that is to judge him can alone decide it, and it should be left to its decision, without being led to it by authority, influence, or fear, which are all alike hostile to the impartial deliberations of justice. If the Commons, therefore, on examination of the subject, shall have reason to think that, consistently with a series of former judgments of the Lords in similar cases, a person impeached has a legal right to be dismissed from the impeachment by a dissolution of the Parliament, they ought studiously to forbear by an exercise of their own authority to place any person accused by themselves in a worse condition before his judges than he might stand in without such interference, and rather repair the defect of the law by a prospective statute, than deprive an individual of the protection of it by an *ex post facto* resolution.

It appears to me that the jurisdiction of deciding on the existence or state of the impeachment, as it may be affected by the dissolution of Parliament, is a question equally judicial, with any other that may occur in the course of trial; for the Lords may be obliged to decide it upon the objection of the person accused. And I can not conceive that the Commons have a privilege to affect the state of the prisoner in judgment. If the Lords, indeed, were, *mala fide*, to give judgment

hostile to the validity of an impeachment, and contrary to established rule and custom ; which, in the absence of statute, can alone determine what is law ; such a proceeding would deserve the most serious consideration, as a dangerous abuse of judicial authority. But still the question of judicature would not be changed, by the possibility of such a supposition, and it equally remains to be decided by precedent, what the custom and rule of proceeding has been, which established the law, for I never will admit that policy, however wise or expedient, however urgent, can alter the rule by which an English subject, under the English law, has an unquestionable privilege to be judged.

If the decision then is with the Lords, it is next to be examined by what rule it ought and may be expected to be decided by them ; for that too must be settled before the precedents can be stated with effect. If the rules of decision are not to be found in Lords' journals, where are they to be sought for, and what rule of law for the protection of the subject can exist ? And is it to be believed, that after the virtue and wisdom of ages have been exerted for the security of the subject, against every species of arbitrary power and punishment ; is it to be believed, that when the probability of oppression in accusations of state had reduced our ancestors to provide so many securities against vexation, in the course of trial, that they should

purposely have left, without bounds or limits, an engine of power, highly necessary indeed, but like every other power that is not measured by law, destructive of all the happiness and security of life? I apprehend, therefore, that the Lords must govern themselves by the judgments of their own House upon similar occasions; and must deal with me, if I were placed before them, as they have dealt with others in judgment. A person accused, has, by the genius of the law, a right to come under the protection of technical and formal objections, even when he stands not within the reason of them, much more if the protection insisted on were found to be consistent with the whole spirit, and all the analogies of justice. The court of King's bench could not enforce Mr. Wilkes's outlawry, though valid in every substantial part, because the county court, where he was proclaimed and exacted, was not described upon the record with the precision sanctioned by custom, though it is plain to a common reader, that it was described so as to be distinguished from any other. The first inclination of the mind opposes such a precedent; but the defeat of justice in that, or any other particular case, is never lamented beyond its measure by any wise man; because even when good judges must thus sometimes stand disappointed in the just execution of law, from the strictness necessary to the administration of it, the example forms an

inexorable barrier against the inroads of power and tyranny, in cases where policy and expediency might easily be warped on the spur of occasions, to confiscate property, or to destroy liberty and life. I admit that the power of defeating an impeachment is an inconvenient and exceptionable prerogative of the Crown ; but not more dangerous than many other prerogatives formerly belonging to the kings of England, which in subsequent ages have been taken away. But how taken away? Not by resolutions of their inexpediency, acted upon till the prerogatives were abandoned without statute, but by the regular course of legislation, the Commons employing the weight of their privileges to compel consent to a new and better rule of action, and not by destroying the sanctions of government, or beating down one dangerous power by the introduction of a greater. I, therefore, insist that the state of the impeachment must be decided on by the court where the Commons by law have lodged it; and that the former judgments of that court of competent jurisdiction and an acquiescing legislature, constitute the law on the subject. By an acquiescing legislature, I mean, that when a series of judgments, by a court of competent jurisdiction, *a fortiori* of a court in the last resort, has established any rule of decision, every subject has a right to the benefit of it in judgment while the rule remains in existence, unre-

versed by the authority of Parliament; and, therefore, I shall venture to consider that the solution of the question (let it be discussed where it may) depends wholly on the judgments of the Lords in similar instances, to be collected from their different acts, as found in the journals of the House.

Mr. Erskine, having thus laid what he called the foundation of his argument, and having discussed the abatement of writs of error in Parliament, by the common law, before 1673, was advancing to the precedents, when, owing to his fatigue in the courts, in the earlier part of the day, and the intense heat of the House, he told the chairman that he was unable to pursue his argument.

December 22. The order of the day for going into a committee to take into further consideration the state in which the impeachment of Warren Hastings, Esq., was left at the dissolution of the last Parliament having been read, and Sir Peter Burrell having taken his seat at the table, Mr. Erskine rose to resume his argument, which had been interrupted by his illness on Friday. He said :

The course and turn which the debate has taken, since I had the honor first to address the House, gives additional force to my motion for the search of authorities applicable to the subject. If the House had considered the matter as a mere question

of privilege or of expediency, to be decided by their own will, and not by any rule of law, and upon that footing had considered it, as not depending at all upon the judgments of the House of Lords, such a course of proceeding, however improper, would have been, at least, an answer to my motion. But when from the highest authority in the House (the speaker), who immediately followed me in the debate, not only volumes of precedents and records have been resorted to, but even common law judgments have been appealed to, which it can not be supposed the House in general is in any degree possessed of; it surely is an admission that by such criterions the question is to be judged, and renders the collection of them consistent not only with reason, but with the common practice of both Houses of Parliament, even on the subjects of less novelty and importance. The Right Honorable, the Speaker, has admitted that there is no precedent to be found previous to 1678, of an impeachment having survived a dissolution, and therefore not being able to establish that order, on the direct custom of Parliament, he has had recourse to the different precedents, which were collected by the committee in 1673, when the question concerning writs of error was before the House; but, besides that none of these precedents relate to impeachments by the Commons, all of them that were criminal proceedings, and not mere writs of error,

were criminal appeals, directly contrary to Magna Charta, and the ancient statutes, persisted in, even after the statute 1st of Henry IV., chapter 14th, and finally declared by the Lords, on reference to all the judges, to be contrary to law, in Lord Bristol's charge of Lord Clarendon. Such precedents, therefore, even if applicable, can be no legal foundation for the short-lived order of 1678. I have to remark too, that in those cases, the Lords had given a day to the parties, in the succeeding Parliament, which they have omitted in the present instance, even if they have the power to give one; by which, according to all authorities, there is an incurable chasm in the proceedings. The party is without day in court, and his bail finally discharged from their recognizances, which went only to have him before that Parliament; I say, therefore, that Mr. Hastings is not bound to appear, nor have the Lords any process, that I know of, to enforce his appearance; at all events, none to continue the proceedings, which were discontinued by no day being given. For this I refer to Hawkin's Pleas to the Crown, title, "Discontinuance," where all the authorities are collected.

I now proceed to pursue the precedents. That of 1673, founded too on the anomalous and illegal proceedings alluded to, declares only that writs of error continue from session to session, and nothing farther was done on the subject till 1678, when the

Parliament was dissolved subsequent to the imprisonment of the popish lords, under the pretended plot. The nation, at that time, was wrought up to a pitch of frenzy concerning popery, and upon that subject neither the voice of reason nor law could be heard. The Lords and Commons, the accusers and judges of the lords in the Tower, jointly examined Oates, and came to a resolution of the existence of the plot, on the sole evidence of the person who could give it no existence but by his charge on the prisoners, who were afterwards to be tried before the peers. I state this fact to show the disorder and irregularity that prevailed throughout this particular proceeding. On the 12th March, 1678, to give color to the continuance of the impeachments, which by no resolution before that time had been voted to have continuance, it was moved to declare that writs of error, which, by the resolution in 1673, had been declared to continue from session to session, continued from parliament to parliament; and a committee was appointed to search precedents. This was evidently to give color to what followed; for only two days after, viz., on the 17th of the same March, without doing any thing on the first order, it was added as an instruction to the committee to inquire also into the state of the impeachments brought up in the last Parliament; and in two days afterwards report was made to the House,

that "on perusal of the journal of the 29th March, 1673," which, as had been shown, applied only to the continuance of writs of error from session to session, and without search of any other authority, or statement of any one principle, they reported that the state of the impeachments brought up in the former Parliament was not altered, and the Lords agreeing in this report, made the order of 1678. This order, therefore, was established upon no antecedent custom of Parliament, but stood on a most strained and forced analogy to writs of error, which writs of error, it is notorious, never did continue from Parliament to Parliament, till the existence of the order in question, as appears by the authority of Lord Hale, and Lord Coke, and a decision of all the judges, temp. Charles I.

To prove that this novel order was made on the spur of the occasion, I proceed to show the immediate and barbarous use which was made of it on the trial and execution of Viscount Stafford. Lord Nottingham, whose authority has been cited for the continuance of impeachments, was speaker of the Lords on that trial, and kindly consented that Lord Stafford should have counsel, provided they did not stand near enough to prompt him, and the aged and infirm prisoner was refused the right of arguing the question, whether his impeachment had not abated. Perhaps, however, the managers of that day were right, when they objected to the

admissibility of such argument, the existence of the order of 1678; but for that very reason, if a good one, the argument now turns the other way, since the reversal of that order of 1678 by that of 1685. I will now state that reversing order, and the language of it should be attended to. It is not a resolution either in the abstract, or in a particular instance, that impeachments abate by the dissolution of Parliament, leaving the order of 1678 still standing as an existing resolution, which might have left future times to cite one judgment against the other, as they happened to be most consonant to the opinions of those who adopted the one or the other in argument. No, the order of 1685 entirely cuts down and annihilates the former. The words of it are, "Resolved, that the order of the 19th March, 1678-9, shall be reversed and annulled as to impeachments."

If the Lords had jurisdiction to make the order of 1678, they had surely jurisdiction to unmake it, as the first stood on no antecedent custom or rule of practice; and, therefore, while the order of 1685 remains in existence, the matter is not debatable, and the Lords (let the Commons vote what they may) can not, without an act of violence and caprice, refuse the benefit of it to any man standing before them in judgment. The question, therefore, is, whether the order of 1685 is now in force? As to that, I say it stands to this hour on

the Lords' journals from the time it passed, and no impeachment has continued from Parliament to Parliament. Persons impeached have, as will appear, been discharged from imprisonment on the footing of its existence, and under its direct authority; and the Commons, neither when it was passed, nor subsequently acted upon, have ever made the smallest objection of any invasion of their privileges, or invasion of the law.

Before I leave the order of 1685, I will take notice of Lord Anglesea's protest against it, stating, among other reasons, that it repealed the order of 1678, which was agreeable to the practice of all former times. I say the assertion was as indecent in Lord Anglesea as it was false; for it appears from the Commons' journals that this very Lord Anglesea, who was manager for the Lords in 1678, told the Commons, at the conference in the Painted Chamber, that in the continuance of the impeachments the Commons had gained a great point, which, though not admitted by the Commons, showed the sense of this protesting Lord upon the subject. From one part, however, of Lord Anglesea's protest a good principle may be collected; for the Lords, as a court of law, ought to abide by rule, that the subject may know how to apply for justice. His argument was good, but his facts against him.

Having examined these two precedents of 1678

and 1685, I say that the true way of settling their authorities is, to examine what was done by the Lords themselves, and how they regarded them, the first subsequent time that the point occurred; and also to observe how the Commons behaved on the same occasion. The next precedent, then, was of the Lords Salisbury and Peterborough, who were impeached of high treason in 1689. Parliament was dissolved in 1689, and a new one met in the same year. In 1690 these lords petitioned to be discharged from their imprisonment, stating the dissolution of the Parliament, and also a free and general pardon. The operation of the pardon was referred to the judges; and on their answer, the question being put for their discharge from imprisonment, it passed in the negative; and being then admitted to bail, they remained subject to the impeachment, till they were discharged wholly upon the search for precedents, and on the order of 1685. This is evident to whoever will look at the journals, though it is not easy to show it to two hundred persons who have not the precedents, and who refuse to look at them. After the answer of the judges, the matter of pardon was never discussed again; but the Lords assembled on the general question of the continuance of impeachments; a committee having before been appointed to search precedents on the subject. It appears by the Lords' journals of the 30th of March, 1690,

that the committee on that day reported, "That they had examined the journals of the House, from their beginning in the 12th of Henry VII., and all the precedents of impeachments since that time, which were in a list in the hands of the clerk, and also all the precedents brought by Mr. Petyt from the tower, among all which none were found to continue from one Parliament to another, except the lords who were lately so long in the Tower,"—alluding to the popish lords who were kept there under the order of 1678, and afterwards discharged under the order of 1685, which annulled it. It was upon this report, and not on the footing of pardon, that Lords Salisbury and Peterborough were discharged. The entry mocks all argument; it is only necessary to read it. The words are, "after consideration of which report, and reading the orders made the 19th of March, 1678, and the 22d of May, 1685, concerning impeachments, and long debate thereon, it was resolved that Lords Salisbury and Peterborough should be discharged from their bail;" and they were discharged accordingly. What farther shows that the pardon was no ingredient in the discharge, if the state of the proceeding were not in itself conclusive, is, that the pardon could not have destroyed the impeachment, even supposing the parties to be entitled to it, but must have been pleaded before the Lords in bar to it, and on which

the Commons, according to every rule of law, as well as the most inveterate custom and privilege in impeachments, must have been heard. Nothing remains to be said on this case but the conduct of the Commons. Their impeachment was put an end to, and the prisoners discharged without consent, message, or communication; and by a direct affirmance of the order of 1685, made on the face of the Lords' journals; yet no resolution was come to in this place, nor any objection taken by any body, though this happened when the Commons were in high strength, and in the very day-spring of the revolution.

Before leaving this precedent, I will state an additional proof that the Lords acted on the order of 1685; for it will appear, which I did not know myself till after coming down to the House, though I have searched, as I think, diligently, and which is an additional reason for deliberation on such a complicated subject, that a committee to search precedents was at the same time appointed, on the motion of other persons impeached, who were also discharged soon after, on the precedent of Lords Salisbury and Peterborough. It is the case of Sir Adam Blair, Mole, Gray, and Elliott, who were impeached about the same time with the two Lords. A committee was appointed to search precedents, on their application to the House of Lords; and after continuing on bail till after the discharge

of Lords Salisbury and Peterborough, they were also liberated without communication with the Commons, and without any subsequent objection or dissatisfaction, though all these proceedings were of the most public notoriety, and could not be unknown to the House of Commons of that day.

The Duke of Leeds' case in 1701, which follows next in order, and which has been relied on as in favor of the continuance, makes, I think, quite the other way.

After the articles had been brought up, and toward the close of the same Parliament, the Lords, by message, reminded the Commons of their impeachment, and told them the session was drawing to its close. Soon after, the Parliament was dissolved, and on the meeting of the new one, the Lords, without any new message to the Commons, dismissed the articles, entering on their journals, that in the former Parliament the Duke of Leeds had been impeached, articles brought up, and answer put in; but that the Commons not prosecuting, he was discharged. This failure of prosecution must be applied to the expired Parliament; for if the impeachment had continued to the new one, a new message would have been sent, before the articles were dismissed for want of prosecution, according to a privilege always insisted by the Commons, that the Lords, on an impeachment, can take no step but in their presence. The discharge

was clearly, therefore, because the jurisdiction of the Lords was at an end, and not an act of judicature on a subsisting impeachment, as the Commons never made any complaint, as they did when Lord Somers was acquitted in their absence.

In the cases of Lords Somers, Oxford and Halifax, the entries are similar to that of the duke of Leeds, and are open to the same observation. But I come now to the last and only remaining precedent, of the Earl of Oxford, in 1717. That precedent establishes, beyond all question, what effect a dissolution was then supposed to have on an impeachment; for if it had then been doubted, much more if it had been denied, that a dissolution would destroy an impeachment, it is extravagant to believe that Lord Oxford could have been advised to build a petition to be discharged on the intervention of a prorogation only, even if a dissolution had been taken to be ineffectual; and still more improbable that the Lords would have seriously entertained it, and searched for precedents on the subject. It is true it was decided that the intervening prorogation had not terminated that impeachment, but the language of the Lords who protested against the decision, demonstrated that there was but one opinion concerning the effect of a dissolution; for if the Lords who voted against the effect of the prorogation, had built their opinion on the denial also of the effect of a disso-

lution, the protesting lords must have seen that the vote had been given on the reversal of the order of 1685; whereas they say, that as they, in opposition to the other part of the House, could see no difference between a prorogation and a dissolution, they were afraid that the vote would tend to weaken the order of 1685; a language perfectly absurd, if they had conceived that the vote had been grounded on a reversal of it. The language of the protest was therefore plainly this: "We are all agreed about the effect of a dissolution, which is the settled practice; but this vote against the effect of a prorogation, which we can not distinguish from a dissolution, may bring even that point into doubt, which was not meant to be questioned."

I will now notice the cases at common law which have been cited, particularly the case of Carthew, where Lord Holt is supposed to have decided that impeachments are not abated by dissolution. That case was an application by Lord Salisbury to the King's bench to be bailed before the Parliament met; and he was properly told by the King's bench, that being impeached of treason, he was not within the act of *habeas corpus*, and therefore not being, *de jure*, bailable, the rest was, of course, matter of discretion. The court, indeed, then took notice that commitments of the Lords continued, notwithstanding a dissolution of the Parliament. But the case cited for that doctrine was Lord Stafford's,

which was while the order of 1678 remained in force, which beat down all subordinate or collateral opinions; and besides that, the House of Lords, which alone had jurisdiction to decide upon the existence of the articles, made the decision, on the meeting of the Parliament, in the very instance of Lord Salisbury, and without a murmur from the Commons, finally discharged that very impeachment which had been the subject of Lord Salisbury's application to Lord Chief Justice Holt. Lord Chief Justice Holt's opinion, therefore, on a collateral point too, and where the King's bench had no jurisdiction, can never be opposed to the judgment of the House of Lords, which had jurisdiction, and which decided the very point in the very instance for which Lord Holt's opinion is cited. I rest, therefore, my argument on the principles I set out with, the judgments of the court competent to decide, and an acquiescing legislature; nay, what is stronger than both, acquiescing accusers: for, besides that it had been admitted that no impeachments before 1678 appear to have been continued from Parliament to Parliament, the case of the Duke of Buckingham, in the time of Charles I., shows the sense of the Commons themselves on that subject. They had impeached the Duke, who had become universally odious; apprehending the loss of their proceedings by dissolution, they sent a remonstrance to the King upon the subject; but

the Parliament was, nevertheless, dissolved. The new one met, equally revengeful against Buckingham; yet, instead of going on with the impeachment, they addressed the King to remove him from his counsels, on the imputation of the crimes charged by the former articles; but the impeachment was never mentioned again, not even in the debate. It is worth observing, too, that Lord Chief Justice Coke sat in that Parliament, who had been removed from his seat in the King's Bench by Buckingham, who had also made him sheriff, to prevent his return to Parliament: yet it never occurred to that great lawyer, with all his resentments about him, to consider the prosecution as existing.

Having now stated the precedents, I may remark, that they all tend to the utter extinction even of the articles in the Lords' House, by the dissolution of Parliament, without the right of proceeding, even *de novo*, on the trial; for in every one of the precedents, the articles were only carried up, and no proceedings were had in the original Parliament which received them; and even the solitary order of 1678 did not declare that an impeachment in part proceeded upon, remained in *statu quo*, to be taken up again without a recommencement of trial; so far from it, that it appears to be worded to repel such a conclusion; for though, in the very same order, the Lords declared,

in the abstract, that writs of error, on which no trial could exist at all, to be broken and divided, continued from parliament to parliament; yet, in the next line, when they came to impeachments, they studiously changed the style, and instead of declaring generally that impeachments also continued from parliament to parliament, they only resolved that the dissolution did not alter the state of those impeachments brought up in the preceding parliament; a declaration which, as no trial had begun on them, can not be brought to bear upon the present impeachment. Leaving, therefore, the question of the total abatement to rest, for the present, upon the authority of the precedents only, though they may, in my judgment, be forfeited by solid principles of law, a much greater question lies behind, which the resolution, though its meaning is avowed by its supporters, does not distinctly express, viz., whether supposing the articles themselves do still remain of record untouched by the dissolution, the proceedings upon them exist in *statu quo*? a position not only without support from any one precedent, but, I think, repugnant to every principle of English justice. The particular convenience or inconvenience of Mr. Hastings, as to this particular trial, has nothing to do with the argument. I will examine it as it must affect the public and future ages.

In order to decide upon both the questions, *i. e.*,

either upon the existence of the impeachment at all after a dissolution, or its existence in *statu quo*, if it still remain, the principles of English criminal law, and the rules of criminal trial in other cases, should be considered; because the constitution, in permitting the existence of a court of impeachment, as a supreme criminal court for high and extraordinary occasions, can never have intended that it should bring all the other laws into disrepute, by an avowed departure from their principles, or deprive the subjects of England of the great protections of English justice, applicable to every other occasion.

I admit that the nature of the trial by impeachment deprives the accused of many advantages which the law has provided for the safety of accused persons in all other cases; and that therefore the reasonings from other proceedings will not closely apply; but in the absence of precedents, I think that the universal securities and sanctions of justice ought not to be farther violated, than necessarily and unavoidably flows from the very frame and constitution of the court; and that in considering whether the impeachment at all continues, or, if continuing, can go on in an uninterrupted course, the House ought eternally to keep in view the general principles of English criminal law and justice, and to apply them as far as precedent and sound analogy will support the application. I will

bring in review before the House, the anxious solicitude of the constitution, which is but another name for the law, to protect persons accused from all vexation and oppression. The provisions which I will enumerate, and which my whole life has been spent in seeing carried into daily effect, constitute the great characteristic of English liberty, established for ages, and which other nations are now struggling, through blood and confusion, to obtain. It will be found, I am afraid, that an impeachment continuing, as is proposed and insisted on, violates them all.

The first security is, that persons accused shall be brought to a speedy, or rather an immediate trial, to avoid long imprisonment, and the anxious miseries of a doubtful condition. This is amply provided for by the act of *habeas corpus*, which enables a person arrested to call upon his accuser to bring forward his indictment the first session after his imprisonment, and to try him on it at the next ; on failure of which he is, in the first instance, entitled to bail, and in the last, to a final discharge from the accusation.

If some limitation had not applied to an impeachment, by its being a proceeding confined to a Parliament, it appears strange that the provisions of that second Magna Charta were not extended to that case, or at least some convenient limitation enacted, consistent with that species of proceeding ;

for if impeachments may continue beyond one Parliament, they may continue for life, and operate to perpetual imprisonment; and the liberty of the subject will no longer depend on the law, but on the will of one branch of the legislature.

The next great security is, that the persons appointed to try are to be purged from all bias and prejudice, by the challenge of the prisoner. It is true that the constitution of the court, where the judges sit by inheritance, or creation of the Crown, to a certain degree ousts this great privilege; but in one Parliament, or in the course of trials in general, its operation in so large a body can not be very dangerous; but if it can continue from Parliament to Parliament, without limitation, the party impeached may come at last to be judged by strangers to his impeachment, and what is worse, even by his very accusers, who, going up from this House by succession and creation, would judge upon property and life, on their own accusation, yet without the possibility of challenge or objection from the accused. The law of England could never mean to subject any of its subjects to such a horrible inquisition. If, at the time of the Union, the legislature had thought that an impeachment could have had such continuance, it seems reasonable to suppose that a clause of disqualification would have been introduced, to prevent the peers of Scotland from sitting as

judges on trials, the first parts of which they by no possibility could have heard.

The last great rule of English trial is, that the trial, once begun, shall go on without alteration or separation, to prevent impressions from any source but the evidence; that the evidence shall be given by the witnesses in presence of the prosecutor, the prisoner, and the court; and that the verdict shall be given on the recent view and recollection of it. Here again, the frame and constitution of the court of impeachment, to a certain extent, deprives the subject of these valuable privileges. But still, considering it as a trial in one Parliament, the evil, though to be lamented, has its limits. The prosecutors are the same; the court nearly so; and the evidence may, during adjournment, or even prorogation, be, with the aid of notes, recollected; but what is the case when the Parliament is dissolved? It can not be said that the pendency of an impeachment should deprive the people of the free choice of their representatives; yet not one member of the former Parliament might return, by election, to the new one. How, then, is such new House of Commons to proceed?

Suppose the former Parliament to have been dissolved just when the accused had made his defence, and while the evidence on which his accusation rested was fresh in his own memory, and present to the recollection of the managers

and the Lords, he had rested his whole defence on observations on that evidence, without calling witnesses, appealing to the honor of the managers for the truth of them, as well as to the justice of the House. Suppose, when he had thus finished, and had impressed even the Commons themselves with his innocence, the Parliament had been dissolved, how, I say, could such a trial proceed in *statu quo*? Are the new Commons to reply to the prisoner, whose defence they had never heard? or is the prisoner to make it over again, when the foundation of it is forgotten, in order that the new Commons may hear it? And supposing he could do it, his defence would still be observations on evidence which the managers had never seen, and of which there was no record, and which, even if recorded, would be written evidence contrary to the genius of English law. Suppose even an interval of years to exist, which might often happen, between the giving of the evidence by the witnesses in one Parliament, and the hour of deliberation and judgment in the next; and in a case, too, where a judgment of guilt or innocence might absolutely depend upon the most accurate recollection of the proofs, in what situation would the Lords and Commons stand upon such an occasion? The lords who had sat from the beginning of the trial must judge wholly from the unjudicial notes of a sleepy clerk, and with but a feeble recollec-

tion of the oral testimony; and the new Lords, open to no challenge, could judge from no other possible source, never having even seen the witnesses who delivered it. And in the same blind manner must the Commons demand judgment against a person whom the old Commons, who had heard the evidence, might have acquitted. By such rules of trial I would not destroy the life of a sparrow, or even pluck a feather out of his wing. I should be glad to hear what the judges, as well as the Lords, would say to the case of a peer indicted for murder in the King's Bench, and whose indictment was brought up by *certiorari* for trial, as it must be, into the Lords' House, if, pending such a trial, and when the most important witness was under cross-examination, the Parliament were dissolved, would the witness be set up again, a twelve-month afterward, to go on with what he had been saying the year before? or would the trial begin *de novo*? I will rest this part of my argument on the answer which the Lords and judges would give to that judicial question, where the Commons can have no pretence of privilege; and if it be answered that the trial should begin *de novo*, I wish to know upon what principles a commoner should be exposed to dangers on an impeachment, which can not belong to a peer, on an indictment for the highest crimes?

[Mr. Erskine, in the same manner, supposed the interruption of the trial by dissolution, at all the different stages in which it might be so interrupted, and endeavored to show the injustice that might flow from each instance.] He then said :

The closest analogies of law condemn this division of a trial ; for before the statute of Edward VI., when the King died during a trial by indictment, even after conviction, no judgment could be given on that trial. All the proceedings fell to the ground, and the party was put to plead *de novo* on the indictment, still remaining of record.

[For this he cited Lord Coke's Reports.]

Mr. Erskine concluded these and other observations, by saying : In the lapse of seven centuries no criminal trial in any court has ever been interrupted, and taken up again in *statu quo* ; nor has any one impeachment ever been so continued from one Parliament to another, nor before the hour in which I am speaking, has such a position been ever hinted at by any historian, or asserted by any man living, in or out of Parliament. Upon all these observations I desire, however, to build but one conclusion, which I hope will not be thought immodest or assuming by the House. I do not desire to make them a foundation for negating the resolution, but only offer them to show that

the subject is as doubtful as it is momentous. I should be sorry to be driven to give my opinion upon it before I have farther considered it, though if I be, I must follow the best light I have on the subject. To obtain a few days for such deliberation, both for myself and for the House, is the single object of all I have said. In conclusion, I would observe that if the House fall in with my proposition, and the resolution is afterwards voted, it will carry with it all the additional weight which the interval of deliberation will have in public opinion ; whereas if it is precipitately brought to a conclusion, though the first glare of the triumph of privilege may give it eclat and popularity, it will not carry the same weight when the eye of history, in future times, comes to be turned upon our journals.

He then moved, "That Sir Peter Burrell leave the chair, report progress," etc.

December 23. The question being loudly called for, Mr. Erskine rose to reply. He said :

I am not surprised at the disposition of the House to terminate a debate of such unusual continuance ; and nothing but my being the author of it would induce me to ask the indulgence of the

house for a moment. I am too much accustomed to take the measure of men's minds from their deportment during debate, not to discover that my motion will have the support but of a very few within the House. I will not, however, relinquish it, but bring the question to a decision. I am happy in being supported by the almost universal voice of a profession, which I am sorry that it has been so much the fashion to cry down. I can not but complain of the manner in which Mr. Burke, in particular, has treated their arguments, particularly my own. I feel, however, no disposition to retaliate. I recollect the superior age, and the various extraordinary qualifications and genius of the right honorable gentleman, though he seems to have forgotten that I have been of the number of those who thought themselves entitled to his friendship and regard. The gentlemen of the law have been considered by him as no genuine members of the House, but as only perched there as birds of passage in their way to another. I can only say for myself, that if I had meant only to rest in this place, in the course of such a pursuit, I should hardly have lighted on the naked bough which supports me, but have sought the luxuriant and inviting foliage which overspreads the opposite side of the House, which would have afforded me kind shelter, and have accelerated my flight.

February 14, 1791. On Mr. Burke's motion, for limiting the impeachment of Warren Hastings, Mr. Erskine said :

I only rise to prevent any misunderstanding of the principles which induced me to take the lead in opposing the former resolution concerning the impeachment. Although I sincerely commiserate the condition of Mr. Hastings, as unparalleled in the annals even of parliamentary justice, yet the part I have acted, is neither built upon compassion, nor upon any investigation of the merits of his case: the principle of my former opposition to the resolution which the House voted, was my opinion, as a lawyer, that the impeachment, whether well or ill founded, was, by the course of Parliament (which to that point was the law of the land), abated or discontinued: I delivered it as my conscience dictated, and according to the best lights I then had upon the subject. I have since taken pains to improve them, and am only more and more confirmed that my first opinion was well founded. The situation of things is now, however, greatly altered. The House is committed to an opinion on the subject, and it is absurd to suppose, that the large majority which has so recently voted the resolution, can possibly depart from following up its consequences to-night. The House has voted that the prosecution is still pending; it has declared, that with respect to the state of an impeachment, a dissolution differs in nothing from

a prorogation, nor a prorogation from an adjournment, nor an adjournment of six months from one of a day ; we are, therefore (at least according to the resolution of the House), exactly in the same situation, as if we had come out of the House of Lords yesterday ; all the resolutions even of the former House remain valid acts ; and the prosecution being thus voted to remain untouched by the dissolution, it follows, that they who would now stop its course, must take upon them the burthen of showing why it should not farther proceed. I can not, therefore, agree that the agitation of the question of discretion should come from the managers : on the footing of the resolution, which is now binding on even those who opposed it, it lies with those who seek to discontinue it. On the rumor, therefore, of a motion for its discontinuance, I came down, ready to listen to any grounds that could be laid before me to justify such a judgment ; but no such materials have been produced. Undoubtedly, the House, notwithstanding the dissolution, may discontinue or abandon its prosecution, on principles of private justice, or of public policy, or of both mixed together ; and as the law is not found strong enough to stop it, I, for one, should be most happy to attain the effect of it by any mode consistently with my duty. But in the present state of things, reasons for abandoning the prosecution must be clearly made out within one

of these principles, by those who propose the discontinuance. For this purpose, it will not be enough to show a probable case of innocence in the accused; we are bound to think him so till convicted; the prosecution only proceeds on probable cause of guilt: and therefore, if the honorable and unfortunate gentleman should be acquitted, I should not, as has been thrown out, agree in thinking that it would be any triumph over the Commons of England; but on the contrary, they would be bound to be parties to the acquittal, and to rejoice in the event. To stop the proceeding, on the principle of private justice, if its continuance be legal, which it has been voted to be, the articles must be shown either to have originally contained no criminal matter; or if containing criminal matters, that the courts below have a competent, adequate, and safe jurisdiction over them, or that the articles were voted without proof; or that, taking the proceeding to have been well instituted, it has appeared since, from defect of evidence, to have been founded in mistake. All these are grounds of discontinuance; but no materials of these kinds are before me for my judgment, and the presumption, till rebutted, is in favor of regularity in all these things. The next principle, which applies more to the debate, is the public policy of discontinuing it. But here, too, I want the data to form a correct judgment. In the

first place, the principle of Lord Cornwallis's conduct, and the necessity of it; his consequent justification and merit, which is to apply to the case of this impeachment, are points to which I can not hastily, and on the materials before me, make up or bind my judgment; I neither know the facts of Lord Cornwallis's conduct nor will I pledge myself to approve it, before there is a necessity, and before I have examined all that belongs to so large and important a subject. But a much greater difficulty is behind; for supposing I were convinced of all that has been alleged respecting that noble person, I want materials equally to make the application. Not having before me either the articles or the evidence against Mr. Hastings, the acts he is charged with, or the circumstances under which he acted, how can I determine that the cases are parallel? And if they are not parallel, the proceeding in the one involves no question of private justice or public policy which bears at all upon the other. These are the reasons why I can not give my vote to stop a prosecution, which, by the resolution of this house, nothing has interrupted, and which remains, therefore, to be proceeded on; as, of course, unless they who move to discontinue it can show that it never should have begun, or having begun, should, from intervenient facts, be abandoned. On the other hand, bound as I am by the resolution which

gives this turn to the debate, I must not forget that I have declared the continuance to be contrary to law ; and retaining most clearly that opinion, from which I never will depart, it will, in my judgment, be inconsistent to vote for the continuance. I will, therefore, without meaning any disrespect to the House, decline taking any share in the decision of this question, or any other upon the subject, till I see, by the judgment of the House of Lords, that the prosecution still has an existence. When that point is decided, it will be time enough to arrange the forms, and to consider the justice of proceeding. Till that decision is pronounced, I shall consider the resolutions as premature, or at least unnecessary.

DEBATE IN THE COMMONS
ON
MR. FOX'S LIBEL BILL .

May 20th, 1791.

Mr. Erskine said : In rising to second Mr. Fox's motion, I declare that I can not sufficiently express the gratitude which, as one of the public, I feel to my right honorable friend for this last instance amongst so many others of his enlightened zeal for the support of the laws and constitution, upon their true principles, and of the warm interest he has constantly taken in the freedom and happiness of the people. Little or nothing is left for me to say ; first, because the admirable speech you have just heard embraces every thing which belongs to the subject ; and secondly, because in the recent proceedings in the courts below, which have happily brought on that fullness of time so necessary for the success of every thing, I have over and over again (the trials, I believe, are in the hands of every body) maintained and illustrated all the principles of the measure before you, so that in now attempting to speak again upon the same subject, it appears to me like a tale that has been

told. The subject, besides, lies in the narrowest compass. The law of libel as at present and for a long time administered, is repugnant to the sound principle, and inconsistent with the ancient practice, of English criminal justice. It destroys the liberty of the press, whilst, as I am prepared from experience to prove, it dangerously promotes its licentiousness. By annihilating the constitutional privilege of juries in a branch of their functions so general and so momentous, it brings the whole of their jurisdiction into dangerous question, and a remedy by Parliament is indispensable, because the evil in its present state is otherwise incurable.

I can assure the House that in nothing I have to say have I any idea of conveying blame or censure upon the conduct of the present judges. So far from it, that as things now stand, from a succession of precedents, though in direct opposition to the most acknowledged principles and practice of ancient times, I should now find it difficult, if I were called upon to fill a judicial situation, to bear up against the current of decisions, though they had obviously broken out of the original and prescribed channel of the law. Libels are divisible into two classes, viz.: those which are the subjects of civil action, and proceeded against as such, and those which are prosecuted by indictment. The rule with regard to the first is fixed and undis-

puted, and as ancient as the law itself. A good name is more valuable than property, and reputation has always been asserted upon principles which have never been prevented nor brought into question. In these cases, as in all questions of property, the judges are the undoubted depositories of the law. The juries are to try the fact of publication, and the meaning or just interpretation of the matter published; but when both are ascertained, the defendant, if he has submitted his defence, or justification to the court, is to be judged by the court, and without such plea can have no defence at all before the jury, if the publication be proved at the trial. In these cases the judges have not only an unquestionable, but a safe jurisdiction, because not only the law in such cases may be brought to a clear and positive standard, but political craft and oppression can neither have an interest in perverting justice, nor any possible means of doing it.

But indictments for libels, above all for those which are prosecuted as being censures upon public men and the acts of government, stand upon an entirely different foundation; and the root of the evil, which now so loudly calls for a remedy, is, that political judges have in these instances, from time to time, confounded criminal proceedings with civil actions; and by abridging the jurisdiction of juries in cases of crimes (above all

of this description), by referring to the rule in civil actions (where it was no abridgement at all), the judges have usurped the unquestionable and immemorial privilege of the jury to decide upon every indictment for any offence whatsoever on the general issue pleaded, whether the defendant is guilty or not guilty ; the guilt in many, or rather in most instances, depending upon intention, which, in the nature of things, it is perfectly absurd to consider as a question of law. It is this departure from ancient authorities and practice which has brought into hazard, or rather has overthrown the most invaluable part of the British constitution.

I consider the jury as the Commons House of the judicial system—the balance for the people against prerogatives which it is necessary to trust with the Crown and its magistrates, but which will often, when unbalanced, degenerate into oppression. The monarchy of Great Britain would not deserve the name of a free government, nor have been suffered since the revolution to exist for a moment, without parliamentary and judicial balances, which, whilst they leave, and even secure to the Crown all the vigor of the most absolute governments, far better secure the freedom and happiness of the people than the most unbridled democracies of any age have ever been able to accomplish ; and I venture boldly to assert that the privileges of this House are not more essential

to resist the power of the Crown than the privileges of grand and petty juries in our judicial system; since, were it not for their daily and hourly protection, the dominion of fixed magistracies would, ages ago, have crumbled into dust the liberties of the people.

As this is a proposition which no man in England will be hardy enough to dispute, what will the House say when it is a matter absolutely demonstrable, that the trial by jury in every case which now affects the most essential liberties of the press has no longer any useful existence; because the judges now apply the law of civil actions to criminal trials, though nothing can be more distinct or different. In the former, the law has been immemorially pleaded to the judges, and can not come before the jury; in the latter, it has always, from the most ancient times, been left to the jury by the general plea of not guilty. In the first the accusation proceeds from the court; in the second it originates with the grand jury. In the first the acquitting verdict of the jury may be set aside, if contrary to the opinion of the judges; in the second it is final; and whilst attaints exist, the jury can never be attainted. To suffer, therefore, such diametrically opposite jurisdictions to be confounded, and such invaluable privileges to be trampled upon, would be to throw away the armor of the constitution provided by the wisdom of our

fathers against powers dangerous to withdraw from the Crown, but more dangerous to exist without the counterpoise of the trial by the country.

As the law stands at present, if a writing be charged even as an overt act of high treason, the court may convict the prisoner upon the mere proof of publication, withdrawing from the consideration of the jury the traitorous intention which, in the language of the statute, is the very essence of the crime; because, according to the course now uniformly taken, the judge tells the jury, in all prosecutions for criminal writings, that they have only to find the publication, and the innuendoes or alleged grammatical interpretation of the paper, and upon that to find the defendant guilty; adding, that if the court shall afterwards consider the writing so interpreted not to be criminal, the judgment will be arrested or reversed upon writ of error. But to expose such doctrine to shame and reprobation, it is only necessary to inform, or rather to remind the House, that if upon such motion the judgment should be arrested, the innocence of the defendant's intention is argued before the court, the answer will be, and is given uniformly, that the verdict of guilty has concluded the criminality of the intention, though the consideration of that question may have been by the judge's authority wholly withdrawn from the jury at the trial. It certainly is now too late to rectify

this monstrous and iniquitous absurdity, except by the authority of Parliament; though the judges who first introduced those doctrines ought to have been impeached and degraded. Indeed the mischievous origin of the system is notorious. Upon the revival of letters, government soon felt the influence of printing upon public opinion, when it was directed against their abuses; and with us the Star Chamber was set on foot to repress it; but the firmness of our ancestors, and the vigor and freedom of our institutions, soon overthrowing that odious jurisdiction, nothing was then left but to pervert the ancient constitution of juries, and notwithstanding the triumphant result of the trial of the seven bishops, when their privileges were fully recognized and acted upon, a constant assault was kept up by subsequent judges against their jurisdiction, and carried to such an extravagant pitch, that on the trial of Penn and Mead for seditious preaching in Gracechurch street, an attempt was made to imprison a juryman for refusing to receive from the court what was falsely and wickedly called the law, though a plain fact for the jury's consideration, an outrage which was exposed and beaten down forever by the immortal exposition of the Lord Chief Justice Vaughan, who, upon a *habeas corpus*, discharged the intrepid prisoner, a second Hampden, for the example and admiration of posterity.

But notwithstanding all these cases, Lord Chief Justice Raymond, on the trial of the Craftsman, thought fit to tell a jury that the doctrine of its being the judge's duty to leave the whole case to the jury was a notion which had then been taken up of late by some persons who ought to have known better, and this most rash and unfounded declaration has been echoed from judge to judge down to the late trial of the Dean of St. Asaph, though to the honor of the bar be it spoken, the counsel (Mr. Bearcroft) in that case, with a brief in his hand for the Crown, would not surrender the privileges of the people; but what was conceded to the defendant by the adverse advocate, was not granted to him by the court; the doctrine now complained of having been confirmed by the whole Court of King's Bench, when presided in by Lord Mansfield, whom I can never name without affection and respect; and so barren was the usurpation in legal authority, that a ballad found itself in the mouth of that great man, which was sent to Sir Philip Yorke, after the acquittal of the Craftsman, in which the author was supposed to have admitted the doctrine contended for, by writing that,

Sir Philip's innuendoes
Would serve him no longer in verse or in prose,
As twelve honest men had decided the cause,
Who were judges of fact, though not judges of laws.

Whereas on reference to this poetical record, it was found to be just the contrary, viz.,

“That twelve honest men had decided the cause,
Who were judges alike of the fact and the laws.”

I can state from my own long experience what has been the effect of this system. Have juries been prevented from improper acquittals? Has the Crown been secured by it in the preservation of order and obedience to the laws? Just the reverse. Every man, be his acts wicked or charitable, has been looked upon and pitied as the victim of a pernicious usurpation; and juries, whilst they may secretly condemn the criminal, refuse, in many instances, to pronounce verdicts of guilty, when the investigation of guilt has been withheld from them. So that a counsel's best defence of any kind of libel is, to expose the doctrine, and keep the libel out of sight. I can appeal to the whole bar for the truth of this observation.

I shall mention but one case more of the oppression inseparable from the system complained of. An insinuation had appeared in a public paper, that the Russian ambassador was a spy, which was very properly made the subject of a prosecution, but the defendant, who was the proprietor of the paper, was set upon the pillory, though he produced an affidavit of a physician of the highest reputation that he had been delirious in a fever at

the date of the publication, and even that fact was held to be no defence upon the trial. It is surely impossible to figure to the human imagination any thing more disgusting or horrible.

I wish, for the sake of unanimity, that my right honorable friend would for the present put aside the other matter which he has introduced for consideration. I think that nothing should be mixed with the grand and paramount question which may interrupt the harmony of the decision. There is no doubt of the inquisitorial power of the House over the judges, but it is a power which ought to be most sparingly and cautiously exercised. It ought to be kept in the recesses of your authority, to be produced only in cases of the utmost emergency. It is not desirable even to speak lightly or harshly in this House of the conduct of judges, as it tends to disturb that confidence in the administration of justice which is of such infinite importance to the public security and happiness. There is no doubt that in different cases of *quo warrantos*, (which Mr. Erskine here stated,) Lord Mansfield and the other judges have laid down the doctrine of a year's limitation, and in two years afterwards directly the reverse; an evident proof how much they are embarrassed by the uncertainty of matters which, from their very nature, were not subjects of judicial discretion. The abridgment of

such jurisdiction would be easier for the judges, and safer for the people.

May 25. On Mr. Fox presenting the bill, Mr. Erskine said :

Sooner than consent to give up the preamble of the bill, I will abandon the bill for the present altogether, and leave it to the people of England to protect their rights themselves by their verdicts when on juries, until a more favorable moment may arise when Parliament will be prepared to recognize, as a clear, unquestionable principle of law, that their rights in cases of libel are the same as in all other criminal trials, in none of which their privilege to pronounce a general verdict has ever been disputed. I desire it may not be understood that because I am a determined friend to the preamble, it is my object to confound the functions of the judge and of the jury. Far from it. Wherever the law has separated them, I wish them to continue separate. Whenever any special matter is legally pleaded, the judge, not the jury, is undoubtedly to decide ; but when the general issue is joined, the law and the fact are then inseparably blended, and the jury have a legal and constitutional right and duty to decide upon both,

by giving a general verdict. This never has been questioned in any criminal case, that of libel only excepted; but neither in principle nor in ancient practice, is there any foundation for the exception. Something I said on a former day has been referred to by my honorable and learned friend, to prove that the practice of the courts, for near a century past, has not been erroneous, because I said that were I now placed in a judicial situation I should feel myself bound to abide by the decisions of my predecessors. I do not mean to retract a syllable of that declaration. I have always been of opinion, that when a practice has long obtained, however erroneous in its beginning, it is better it should be corrected by the legislature than by the authority of any court; because if a series of precedents may, upon the opinion of new judges, be rescinded, there can be neither uniformity nor safety in judicial proceedings, and a fatal uncertainty will disturb the whole system of the law. A stand ought to have been made at first against so dangerous an innovation. These are the grounds on which I have built, and on which I now abide by my declaration on a former day; and I can not help expressing my surprise that any objection should be now made to a bill which has been brought in with unanimous concurrence. It is a want of respect in gentlemen for the House itself, to rise up against its second reading, since by giv-

ing to my right honorable friend its unanimous consent to introduce it, an opinion in its support may be said to have been unanimously given, which what has been said this day can not be thought sufficient to shake.

May 31. The house being in committee on the bill, Mr. Erskine defended the preamble of the bill, and said :

The only argument that can, I think, be adduced for expunging it is, that it is a truism, and perhaps unnecessary. In criminal law, where a general issue is joined betwixt the King and a defendant, the jury have a jurisdiction over the whole matter. The learned gentleman well knows that by these words the jury are not empowered to judge of the law. How can the judge decide on the law till the jury have decided on the fact? for, previous to that, he can not tell how far the law will bear upon the fact. The clause proposed by the learned gentleman is of much more dangerous consequence than may at first be apprehended, as it goes to narrow the jurisdiction of the jury in all criminal cases ; for if these words are adopted, it will look like a kind of declaratory act. It ought not to be adopted, because the consequence that would be produced by it would be of the most dangerous

kind. The amendment tends to weaken the power of the English jury, and thereby endangers the constitution. Instead of entitling the bill, "A bill for ascertaining the law of libels," it should be called, if the amendment were agreed to, "A bill for curtailing the power of juries;" because, if juries are to give a verdict according to the direction of the judge in cases of libels, they may be tempted to pay implicit obedience to his advice, even in cases of much more criminal nature. Should, however, even this consequence not ensue, still the amendment is improper; for in future times of oppression a judge, who may be the tool of the court, will possess the power of controlling the judgment of the jury, to the manifest injury of the liberties of the people. I will state the powers of a jury in criminal cases: if they even pronounce an innocent person guilty, in cases of murder, felony, etc., in the teeth of law and evidence, the judge must pronounce sentence of death in the first place, and the remedy only lies in the King, who can pardon the guilty as well as the innocent, under such a verdict. And again, if a jury, in despite of law and evidence, acquit a felon, he is immediately discharged. Such is the wisdom of the constitution in the interposition and augmentation of the powers of a jury, lest the Crown should bear too hard upon the life of a subject. Nor can a jury be amerced or imprisoned

for their verdict since the days of Bushell,* who was moved by *habeas corpus* to the court of King's Bench, and acquitted by his peers, before Mr. Justice Vaughan. What was the case of the seven bishops? Two of the judges made no difficulty in declaring that the petition which they presented was a libel; but the jury acquitted them. Such is the excellence of our constitution, which provides a check against the influence of bad judges, in bad times!

[Mr. Erskine read a passage out of Bracton, to show that the juries, in the opinion of that old writer, were judges of law and fact; for then it was stated that no man is to be tried in life or limb, but by the *curia* and *pares*, and that the King is not to interfere, because that would make him at once accuser and judge, nor the judge, because he is the representative of the King.]

I certainly wish that the practice should be continued, that the judge should give his advice and direction in the matters of law; but I do not wish that an act should be passed for that purpose. In sea cases, where one vessel runs down another, what is the practice of the noble and learned chief of the King's Bench? Why, that exalted personage sends for some of the elder brothers of the

*See Howell's State Trials, Vol. VI., p 999.

Trinity House to take their opinion. Is this any reason that he is obliged to adopt their opinion? In order still further to strengthen these arguments, I would draw a distinction betwixt civil and criminal cases. In the former, what is the practice? Why the plaintiff enters his complaint on the records of the court; process is issued to compel the appearance of the defendant. If it is a matter of law, it is left to the decision of the judges; if a matter of fact, it is left to the jury. The jurisdiction of the jury extends to the whole matter at issue.

DEBATE ON MR. GREY'S MOTION
RELATIVE TO
PARLIAMENTARY REFORM.

April 30, 1792.

Mr. Erskine said: I do not rise to answer the arguments or declamation I have this night heard, but merely to give my reasons for suffering my name to be printed with the resolutions of the association alluded to ("The Friends of the People"). If I have fallen into an error in this respect, I have the consolation of knowing that I was not the beginner of that error. The right honorable gentleman himself, who, for talents and descent as well as official situation, ranks amongst the first in the kingdom, is before me in it. That right honorable gentleman can not forget that he once, and that his venerable father had always, entertained the same sentiments respecting the necessity of a Parliamentary reform, which the association now professes. Next, as to the mode and time of attempting a reform, I rejoice that I have an opportunity of making my own defence in person, and of stating what I have done, why I have done it, and the time in which I have done it; and I do assure the House the moment that

my opinions are refuted, and my understanding convinced, I shall be ready to acknowledge my error and to retract it. After being thought worthy to be trusted with the affairs of other men, after having lived in various situations and different countries, I can not be induced to think myself so egregiously weak as the honorable and eloquent gentleman who spoke last would represent all the members of this association. They are represented as sounding the trumpet of alarm for the purpose of changing the constitution. But had such been their intention, I, as a lawyer, acquainted with the prosperity of our forefathers under the present constitution, and tasting, myself, of that prosperity as an individual, should not have lent to it the aid of my name. By the very preamble of their declaration it appears that the association looks to the constitution as their principle, and the vitality of their proceedings. (Mr. Erskine read the printed declaration of the association.) I appeal to the House whether the words, "making the preservation of the constitution, on its true principles, the foundation of all their proceedings," do not expressly limit them within a boundary that precludes the possibility of their attempting any thing dangerous? Can they, I ask, consistently with this declaration, infringe the royal prerogative or in any way meddle with the King's majesty, or with the Lords? So far from injuring the consti-

tution of this country, I would sooner turn back to the profession I have left, and fight and perish for it. In reply to any apprehensions of other danger, I shall only quote the opinion of Dr. Johnson, and say that, "to suggest an idea of our constitution being overthrown by a rabble, is to suppose that a city may be destroyed by the inundation of its own kennels!" I do not mean to enter into a historical disquisition on the subject, or remind the House that the present mode of election originally took place by accident; but will the right honorable gentleman (Mr. Pitt) propose as a resolution, that the representation of the people is adequate to every purpose of sound policy, and to the supposition of the constitution, and so condemn the notice which is given in parliamentary form? If not, what has happened since he brought forward his motion for a reform, to make such a measure less expedient or less necessary now than it was then? Grant that the country is in a more prosperous situation, yet it has no security against a relapse, but in the wisdom of the right honorable gentleman. But I am happy that the chancellor of the exchequer stands in the same situation with myself, and has at least equally incurred the censure of the very eloquent gentleman (Mr. Burke), since he was amongst the first to excite the spirit of change, and has laid the foundation of that to which I and my friends

are only about to add a brick. It is the intention of the constitution that the House of Commons shall be a representation of the people. If I were to say what I think as to the fact of its being so, there might be reason for interrupting me. I shall say, however, that it is not a representation as it ought to be; and in recommending such a reform as would make it what the constitution meant it to be, I do not conceive that I can be charged with a wish to subvert the settlement, and propagate confusion and disorder. I have spent a melancholy day in the court of king's bench—melancholy, because I have this day heard a gentleman (Mr. Horne Tooke) say to a jury, in his own defence, that the rotten boroughs are looked upon in the House of Commons as its vital essence; that acts of Parliament have been passed on their account, to take away the trial by jury; and that these acts are too infamous, and made by people too infamous, to be attended to by a jury of the country. Such an expression no man would dare to venture upon unless defects exist; and therefore the house ought not to suffer these defects to remain unremedied. The Russian armament is an instance in which the sense of the House and the people were diametrically opposite. The Parliament was all confidence, the people all murmur; and the House was proceeding, without hesitation, in every vote which the minister required, till

called to order by the interference of the people. This never ought to happen, nor could it happen, if the people were adequately represented. If the facts on which the association has been founded are either false or exaggerated, then their efforts will be still-born and abortive. But if, on the contrary, their union is formed on a right principle, and if it shall also appear that there are persons in the country who are determined to achieve every possible mischief to the constitution, then the association may take their motto from Mr. Burke, who has said, in one of his works, that "when bad men conspired, it became necessary for good men to associate." In this view of the question I may add, from the same authority, "that temperate reforms are wise in proportion as they are moderate, and that great reforms are bad as they are desperate. The latter ever resembles the conduct of a mob before a brothel, who abate the nuisance by pulling down the house." The reform which my honorable friend means to propose will be conformable to these maxims; and not being to be discussed till next session, that it is not now stated, is no more an objection to it, than it would be to the recipe of a physician, that it had not been written six months before the prescription was to be taken. If the House does not afford relief, every man will be driven back to his individual capacity; and when the people begin

to act for themselves, it is to be feared that their demand may not be so reasonable as at present. It has been said that the manner of bringing forward the subject is wrong, because there has been an application to the people. This application arises from the necessity of the case. In pleading the case to the House, it is pleading it to the interested party. It is literally addressing argument to the deaf adder. I do not mean personal enmity to any right honorable gentleman, and I believe that I have as few enemies as any man; but will gentlemen consent to give up the privileges which they consider as their birthright? they who are proprietors of boroughs, will they give them up? It is as if, in the course of my profession, I should attempt to plead for an ejectment to a jury who were tenants in common of the estate which I claimed. I am a friend, in some degree, to what a right honorable gentleman called a natural aristocracy; but, during this administration, so many peers have been made, not for any of those merits which properly claim the honor, but for possessing parliamentary influence, that this part of the constitution will be ruined by its own corruption. All those persons who are promoted to the peerage, leave their delegates in this House. In fact, Parliament is so constituted that the right honorable gentleman, independent of his situation as the first political servant of the Crown, can not, by the

finest speech he ever made, and with the justest cause which he can choose, convert one single vote. The measures of the association so much alluded to, are the most likely to preserve the peace of the country; and therefore I have subscribed to them. If their tendency were otherwise, I must be the worst of lunatics, my situation considered, my unparalleled success, my prosperity so wonderful when my origin is viewed, my present possession of every thing to make a man happy, and my prospects, which there is nothing to interrupt. Why should I then waste my own constitution when I am endeavoring to preserve that of the country, and when I might be in peace with my family, if my attempts were to endanger that prosperity which is so dear to me?

DEBATE ON MR. FOX'S MOTION.
FOR
SENDING A MINISTER TO PARIS.

December 15, 1792.

MR. ERSKINE.

I have been so much accustomed in another place to hear the interests of mankind conducted upon the principles of reason, instead of being betrayed by passion, that declamation, however eloquent, makes no kind of impression upon me. I think we have nothing to do with the new constitution of France, nor ought to mix her distracted revolution with the settled condition of our own country, which I may take full credit to myself for wishing to support. The same anxious wish is the obvious object of my enlightened and honorable friend; yet no sooner is the motion made than a noble lord starts up, and in a storm of the most extravagant description, reprobates both the motion and the motive from which he charges it to have proceeded. If the noble lord is really ashamed (as he was pleased so say) of the enthu-

siasm he formerly felt for my right honorable friend (Mr. Fox), whose principles he has so often recommended to others, and acted upon himself, ought he not to be still more ashamed of the enthusiasm of to-day, which has taken so new, so extraordinary, and so unfounded a direction? If my right honorable friend were an enemy to his country, all the world ought to desert him; but after the many proofs of his warm zeal to support it, so often testified by the noble lord himself, what color is there for so sudden, so unprovoked, and so violent an attack? On the first day of the session we were not only not considered to be at war with France, but a strong disposition was expressed to avert hostilities. What then is the objection now to what my right honorable friend has proposed? When he advises the sending an ambassador, does he advise to put into his mouth any thing degrading to the country, or injurious to its interests? No. He only desires that we should have a person on the spot, clothed with a public character to give facility to a treaty, if a suitable opening should present itself; just, in short, as we should proceed, and always have proceeded, with every other power. But it is said, that it would be nugatory for the House, in the present state of things, to advise the King to send an ambassador, without also advising the instructions to be given him. I confess I think otherwise, and that the

embassy proposed should, like any other, be under His Majesty's direction.

But France is, it seems, in a situation too disturbed to justify an embassy. That is, however, only to say in other words, that, because France is internally disturbed, we are resolved, on that account, to go to war with her, whatever may be her disposition for peace; for war is the certain consequence of putting her under this new and unheard-of proscription. If war, indeed, were inevitable, we ought to meet it boldly; but if we have a justifiable choice to avoid it, we surely should consider before we resolve to wage it, since how, after it is once begun, is it ever to be ended? Are we resolved never to be at peace again with France until she has formed a government which falls in with our opinions of moderation and justice, or until she has formed one upon the model of our own? Until one of these things take place, which are so little likely to happen, are we to be plunged into all the horrors which ever attend the most prosperous hostilities, most especially in the condition of our country, so much exhausted by the ruinous contest with our own colonies; and all this upon the ridiculous punctilio of sending an ambassador, which makes the evil quite incurable, because, while it involves us in a war, it may equally prevent its termination.

But we are afraid, it seems, of the contagion of

French principles. Is that a reason against sending an ambassador? Are we afraid that, on his return from an unsuccessful embassy, he may bring over the infection? The plague of the mind is not like that of the body; it can not be imported in a bag of wool. Did we ever before refuse to send ambassadors because countries were wickedly or absurdly governed? Did we refuse to send one to Morocco, and declare war against her, on account of her despotism or superstition?

I am as much an enemy as any man to violent and intemperate strictures upon any supposed defects in our government or constitution, yet I can never feel any alarm when they occur, as they ever must in a free country. I trust to the good sense of the people and to the substantial interest they have in our long-tried and inestimable establishment. I revere and love it myself, and with as much reason as most men in the country, of which I only remind the House, as every man is now suspected of disaffection, and is obliged to pronounce publicly his political creed. It has been said that there never was nor can be an occasion nor a period more favorable for a war with France; but I maintain that there never was nor can be a moment favorable for war with any country in the world, when peace can be honorably and safely preserved. It is the scourge of the human race, and every statesman ought to bear in constant memory Dr.

Johnson's admirable and striking picture of its calamities. I read it long ago, and never shall forget it.

In his "Falkland Islands" Dr. Johnson says, "It is amazing with what indifference the greater part of mankind see war commenced. They who have only read of it in books, or heard of it at a distance, but have never presented its evils to their minds, consider it as little more than a splendid game; a proclamation, an army, a battle, and a triumph. Some indeed must perish in the most successful field, but they fall upon the bed of honor, resign their lives amidst the joys of conquest, and filled with England's glory, smile in death." Such, I am confident, will be the death of every Briton, who, if we are forced into a war, shall fall in battle for the honor, the safety, the constitution and the freedom of his country. But let us see the other side of the picture. The life of a modern soldier is ill represented by heroic fiction. War has means of destruction more formidable than the cannon and the sword. Of the thousands and ten thousands that perished in our late contests with France and Spain, a very small part ever felt the stroke of an enemy; the rest languished in tents and ships, amidst damps and putrefaction; pale, torpid, spiritless and helpless; gasping and groaning, unpitied among men, made obdurate by long continuance of hopeless misery;

and were at last whelmed into pits, or heaved into the ocean, without notice, without remembrance. Thus, by incommodious encampments and unwholesome stations, where courage is useless and enterprise impracticable, fleets are silently dispeopled and armies sluggishly melted away. Such are the inevitable evils to which we expose the best and bravest of our fellow subjects by war; and what are the advantages we reap from it, even when the termination is most prosperous? and who are they that reap the profit? They only who are ready on all occasions to raise the voice of acclamation when war is proposed. Hear again Dr. Johnson: "Thus is a people gradually exhausted, for the most part, with little effect. The wars of civilized nations make very slow changes in the system of empire. The public perceives scarcely any alteration but an increase of debt; and the few individuals who are benefitted are not supposed to have the clearest right to their advantages. If he that shared the danger enjoyed the profit, and after bleeding in the battle, grew rich by the victory, he might show his gains without envy. But at the conclusion of a ten year's war, how are we recompensed for the death of multitudes and the expense of millions, but by contemplating the sudden glories of paymasters and agents, contractors and commissaries, whose equipages shine like meteors, and whose palaces rise like exhalations."

tions? These are the men who, without virtue, labor or hazard, are growing rich as their country is impoverished. They rejoice when obstinacy or ambition adds another year to slaughter and devastation, and laugh, from their desks, at bravery and science, while they are adding figure to figure, and cypher to cypher, hoping for a new contract from a new armament, and computing the profits of a siege or a tempest."

These are the men (I know they are), who dwell in palaces rather than common habitations, who revel in luxury and riot; who, without virtue, industry or courage, derive a splendid revenue from the ruin of their country; who look upon every new contract as an estate for which they would sacrifice one half of their species; and when the toils of the battle are over, proudly despise the very men by whose labor they became rich. I will not consent to the ruin of my country by war to oblige such characters. I say you should deliberate again and again, before you commence it. I will not attack the chancellor of the exchequer, who is not yet returned to this house,* but he has asserted in the King's speech, and the house has agreed to the truth of it in

*Mr. Pitt was absent during the debates of the 13th, 14th and 15th of December, having not yet been re-elected since his acceptance of the office of Lord Warden of the Cinque Ports, which had been vacated by the death of the Earl of Guilford.

their address, that the surplus, as it is called, will be sufficient to carry on the war without a fresh imposition of taxes. Do you really mean to say that such a miserable pittance is sufficient to carry on war, and that, too, at a time when we are hardly able to make the revenue meet the various claims upon it? What sort of a war is it to be that is thus to be supported, and against a people too who are described (but I do not join in the description) as having become savage beyond all example, who have no sense of justice or humanity, and are aiming at universal dominion?

But it seems that my right honorable friend (Mr. Fox) is a dangerous man to his country at the present moment, from the opinions he holds; and a right honorable gentleman (Mr. Burke) lets loose all the virulence of invective against him, because, after years of agreement and friendship, he now happens to differ from him. I am sorry to be called upon to observe this, because I never can forget the merits of the right honorable gentleman, whose writings have shed a lustre upon our country and its language, and from which I myself have learned to love the principles I am now maintaining. But I wish it to be recollected that at the time those very writings were published, the author and his opinions were treated with as much asperity in the House as the opinions now held by my right honorable friend. These recol-

lections ought to teach us to bear with one another, and not to be rash in imputing wicked opinions to all who differ with us in politics.

As to my right honorable friend, who has been made the subject of these reflections, he needs no eulogium. All the world knows him to be a man born for great public purpose, with a mighty mind to comprehend, a commanding eloquence to illustrate, and a temper to give popularity and effect to the best interests of his country in the worst of times. He has said that he will stand in the gap to preserve the constitution; and men now in the presence of the House, whose characters are as irreproachable as their talents are eminent, have declared that they will stand by him and with him in its support.

It is necessary for the country and for ourselves to hold this language of self-defence. It has become almost a custom to treat gentlemen rather as conspirators than as members of the House of Commons, if, when speaking of France, they do not pour out upon her the vials of their wrath; and in the very same manner are they treated, if, when speaking of our own government, they do not launch out into the most hyperbolical admiration. They are, indeed, rather in the condition of criminals who have to answer for offences, than as the people's representatives delivering their opinions.

But, to return to the question, the country ha

been said to be ready in many parts to fall into insurrection. Another strange reason for war, since adding to the burthens of the people can only add to popular discontent. But the great question of all is, if war is to be made, how and when is it likely to be concluded? Because if no probable conclusion can be held out by those who vote for it, they vote for a war of which they see no profitable, nor, indeed, any termination. Deeply impressed with these considerations, I give the motion which is calculated to avert it my most cordial support.

DEBATE
ON THE
TRAITOROUS CORRESPONDENCE BILL.

March 15, 1793.

MR. ERSKINE.

When the learned gentleman (the Solicitor-General) threw out some expressions concerning the soreness of some persons upon the present subject, I am persuaded he did not mean to insinuate that there were any persons within the walls of the house less desirous than himself to maintain the tranquillity and prosperity of the country. If he had entertained any such suspicion, I am sure he would have been manly enough to say so. On the present occasion I confess that the Attorney and Solicitor-General have greatly the advantage over me. They no doubt have examined every authority in any manner connected with that which they intend to propose; whereas I have no information upon the subject of treason except that general knowledge which grows out of the study of the law, as from the practice of it I have

learned nothing ; for such is the attachment of the people to the present Sovereign, and such their reverence for the constitution, that during the fifteen years I have been at the bar, I have witnessed but one trial for high treason, and in that solitary instance the prisoner was acquitted.

I maintain that the bill is directly repugnant to the policy of the best and wisest of our ancestors, and contrary to the highest authorities in the law. The learned gentleman who brought in the bill professes to have taken Lord Hale for his guide. I wish every man present would look without delay into his Pleas of the Crown, and compare the bill with its supposed model. No man was a greater enemy than Lord Hale to those temporary acts which Parliament itself has repeatedly declared to be dangerously destructive of the venerable statute of Edward III. In Edward IV.'s time (a circumstance which the learned gentleman has not found it convenient to refer to) all these obnoxious statutes were swept away, and in the reign of Queen Mary they were again swept away, with a preamble reprobating their pernicious and impolitic principle. Thus, as often as they sprang up, like weeds in the wholesome harvest of the law, the legislature mowed them down and destroyed them. Why, then, are the fundamental principles of criminal justice, thus consecrated for ages, to be now shaken by an unnecessary and mischievous

act of legislation? By the ancient statute of Edward III. no man can be guilty of high treason unless his mind be proved to be traitorous; whereas this bill, the very foundation of which is unjust suspicion of the people, declares specific acts to be traitorous, without regard to the intentions specified in the original act of King Edward, with a view, it seems, to guard men against falling into treasons. For my part, "*Timeo danaos et dona ferentes.*" The Attorney-General, by this bill, gives a statutable exposition of treasons which I deny to be a just one; and even if it were, judges upon the new text may build up new constructions, as they did upon former ones. The great value of the ancient law is simplicity and security. The mind alone can be traitorous. Compassing and imagining the death of the King, levying war against him, and adhering to his enemies, are all acts of the mind, evidenced by the overt acts of their accomplishment; but under the present bill, if it pass into a law, a man may be convicted of treason with as little ceremony as if it were for pulling down a turnpike gate, or for some petty offence against the excise or customs; the connection may be supported without due regard to mischievous purpose. New constructions, besides, as I have just said, may arise upon the bill when it comes to be expounded in the courts. Another Attorney-General may also come with some new bill upon some

assumed new necessity, and thus the liberty of the subject may be expounded away until it is lost and destroyed altogether. It is urged that the circumstances of the times call for this extraordinary measure. I desire to know what are these circumstances, which can justify the lessening or endangering the freedom of the country. I know of nothing which has happened, except that a false alarm has been propagated for the purpose of strengthening the hands of government, and weakening the liberties of the people; and by this artifice ministers are to have unbounded confidence, and everybody else is to be stigmatized by distrust, and libeled by suspicions of treason and rebellion. Now, where is the evidence to warrant all this, or any part of it? Has the Attorney-General a single indictment against any one person now depending? Has he even any well-founded suspicion that treason anywhere exists? Has he any informations on the file for sedition? Not one of these! Yet the country is defamed, by being described as in a state that requires the laws of treason to be amended. Were the government really in danger from disaffection, I should not have been found setting up improper forms or niceties of law to protect traitors; and I believe that the whole body of the people would join heart and hand to beat down such mischiefs. If the country were false to itself and were falling

into dangerous disorder, there might then be some necessity for a legislative interference. Parliament is undoubtedly omnipotent, and in such a case would have a solemn duty besides to exert all its authority ; but it ought to manifest a sound discretion in the exercise of it. "*Nec Deus intersit*," etc.

I proceed to remark on the other clauses of the bill. It is surely rather absurd to prohibit persons from purchasing lands in France, in the present distracted state of that country, whilst this kingdom is in a condition so highly prosperous, and affords so many favorable opportunities for the employment of money. Instead of prohibiting persons to deal in the French funds, ministers should rather take care that a calamitous war may not prevent them from purchasing in our own. The regulation to prevent persons from coming from France to this country without a license is also highly objectionable. Many of them are persons whose going abroad is unavoidable, some for the recovery of their health, others from the derangement of their affairs. With respect to such persons the regulation is oppressive, as it puts every thing in the power of ministers ; and it is impolitic, as it seems calculated to disgust at the moment when we should be most solicitous to render our own country a land of freedom and delight. On the subject of insurance I remark, that

from the high premiums demanded in war, the balance must be in favor of our insurers. I conclude with again adverting to the statute of Edward III., which I consider is all that is necessary, and as calculated to meet every occasion on which the crime of treason can fairly be alleged. The present bill I therefore consider as both unnecessary and dangerous. Show me the necessity, and I will go hand in hand with you in any act that can be brought forward.

DEBATE ON MR. SHERIDAN'S MOTION
FOR THE REPEAL OF THE
HABEAS CORPUS SUSPENSION ACT.

January 5, 1705.

MR. ERSKINE.

In order to discuss with precision the expediency of repealing the act which the motion seeks to repeal, it is necessary to consider upon what principles and under what circumstances it was passed in the former session ; because the question ultimately will be, whether a necessity for passing it ever existed ? and, if it did, whether it still continues to exist ? The act which the motion seeks to repeal is an act introduced upon the spur of a necessity assumed to be imminent, to suspend the operation of a law which no minister that ever shall exist in England will dare to abrogate ; a law, without which England has no constitution ; a law which the people obtained by the virtue and firmness of their ancestors, after a great crisis in the government, and which they could not and would not submit to part with. To do justice to the minister (for I would misrepresent no man),

this truth was fully admitted by him when the suspension bill was prepared. The suspension of any law is admitted to be the highest act of authority, which the legislature of this country never delegates to the highest magistrates even of the most insignificant law under which the subject lives and is protected; *a fortiori*, a law upon which the very being of public liberty depends. But it is said, and truly said, (for I admit the proposition, though I deny the application,) that there are conjunctures in all states, in which laws made for universal protection must yield to a paramount necessity, and that, as Blackstone says, "the nation, in such case of imminent necessity, parts with its liberty for a short season to secure it for ever." The existence of this paramount necessity was therefore assumed by the minister in the last session; when, after having advised His Majesty to arrest the persons and to seize the papers of many of his subjects, he further advised him to send a message to this House on the subject, which was brought by the secretary of state on the 12th of May last. This message informed the House that His Majesty had discovered the existence of a traitorous conspiracy to hold a convention which was to subvert the government, and assume to itself all the functions of Parliament. I have read the terms of the message, to show that the House did not suspend the *habeas corpus* act upon

a vague, undefined suspicion of a conjectural conspiracy, but upon what appeared to it to amount to sufficient evidence of a distinct, specific treasonable conspiracy against the government; not, as Mr. Windham stated it, a general suspicion of undefined danger from seditious libelers or disturbers of the peace, but a positive, accurately delineated and defined conspiracy to hold the convention, which was to suspend the functions of Parliament. His Majesty's message, and the papers it referred to, were, in consequence of it, referred to a secret committee; that secret committee, by its report, published the evidence, and declared the existence of the same defined specific conspiracy. The chancellor of the exchequer then moved for the suspension of the *habeas corpus*, on the same specific ground, and the preamble of the act itself recited its existence.

The *habeas corpus* act then stood suspended, to the 1st of February; not as to a day that had any thing particular in it; not as an epoch in the country; but as to a period within which the House expected that what had happened would take place, viz: That the matter contained in the reports on *ex parte* evidence, would be confirmed or negatived, and explained in the judicial proceedings set in motion by the House in consequence of its answer to the Crown. The Attorney-General's duty, therefore, under all these circumstances was,

to set the criminal law in motion—to point it to the charges made by the House—judiciously to prepare the charge, to select the most proper criminals upon the evidence, and so to arrange that the grand jury, and afterwards the petty jury, should have the full view of all that the two Houses had prepared. The indictment was therefore prepared, and ably prepared, to meet the whole case, and accurately pursued the views of Parliament; and it charged, therefore, as the crime, the conspiracy to hold this specific convention for the traitorous purposes assumed by the reports. The questions of fact, therefore, submitted to the jury were, whether the defendants compassed and imagined the King's death? and, whether, in pursuance of that traitorous purpose, they conspired to hold a convention, which convention should assume the functions of Parliament? and whether they conspired to provide arms for that traitorous purpose? and whether they published the various papers published in the reports, with the traitorous purpose, *i. e.*, either to hold a convention for the traitorous purposes charged, or to levy war and rebellion generally against the King? The grand jury, which sat, like the House of Commons, on *ex parte* evidence only, found the bill. Indeed they were differently situated from every other grand jury, for they had before found the bill by their representatives in Parliament.

And independently of that legal fiction, they were bending beneath the authority of the King and the two Houses of Parliament, whose pre-judgment had loaded the press for months together. And upon this charge, with greater difficulties to struggle with than I ever recollect in my private practice, the parties were put upon their trials. They severed in their defences; the Crown had its election whom it would try first, and Hardy was fixed upon, on every principle which could guide professional men in the exercise of a great public duty; for he might be said to be privy to what I call the whole body of the evidence. The case of Hardy was opened by the Attorney-General, who had been an active member of the House during the conjuncture which led to the trials, and a member of the secret committee; who, besides, attended the King's ministers assembled in council; who was present at all examinations; and who, added to these advantages, had, I believe, inspected and studied every paper the most remotely connected with the cause; and who was more master of all their bearings than I could have supposed the human mind capable of containing, above all learned and intelligent men, upon such trash as this House had set it to work on.

I am prepared to show, by the sequel of the proceedings, that the juries by their verdicts have, not merely by probable inference, but almost di-

rectly and technically, negatived the existence of the conspiracy, upon which the suspension of the *habeas corpus* avowedly was founded. In order to establish this the Attorney-General had divided the cause into three branches: first, whether the treasonable conspiracy charged by the reports, and which was made the foundation of the indictment, existed at all in any body; secondly, whether the prisoner Hardy had a share in it; thirdly, what was the legal consequence of the establishment of these two propositions of fact? On offering the first branch of the evidence, I objected to reading the writings, and proving the acts of a great number of persons scattered throughout the kingdom, most of whom, indeed most of whose existences, were unknown to Mr. Hardy. I insisted that the connection between the actors and writers with the prisoner should first have been established, before the minds of the jury should be affected by their actions or their writings. I did not mean to argue that point, or to consider its legality; it was enough for me that it was overruled by the court, because it let in the whole evidence which the House had collected—every thing in both reports, and a hundred times more—all that any man in any society in England and Scotland, professing the objects of reform, had done, or written, or said; even the whole or the most material part of the evidence against Watt, at Edinburgh; Watt,

the spy of government, who was hanged to set the thing a-going. If the prisoner's counsel had prevailed in their objection, it might have been said, with some air of truth, that the jury had not before them all the materials for judgment which had been before the House; or, if any technical legal objection had been successfully made to the relevancy or admissibility of any part of the report, the same thing might have been said; or if it had been said before the jury *alio intuitu*; if it had been offered as proof of a criminal disposition in the prisoner Hardy, and not of a general conspiracy, the same plausible argument might have been employed. But I undertook to show, first, that the whole report, or as much of it as the Attorney-General thought suitable to the purpose, was received in evidence at the trial, that no objection prevailed against it, and that it was given in evidence directly and technically to establish the very proposition predicated by the House in its report; so much so, that the chief justice, following the arrangement of the Attorney-General, expressly and repeatedly stated to the counsel and the jury that the general evidence was not evidence which could affect the prisoner, unless afterwards brought home to him; but that it was received to establish the existence of a conspiracy, without which he could not have conspired, viz., a conspiracy to hold a convention for the subversion

of the constitution, which the indictment charged ; the identical specific conspiracy asserted in the preamble of the suspending statute, founded upon the report of the two Houses of Parliament. It was plain from this view of the trials that the major proposition of fact, without which neither any secondary matter of fact, as affecting the individual, or any matter of law for the court to consider of, could arise, was the belief of the jury, that a general conspiracy, such as the indictment charged, existed somewhere. The lord chief justice had expressly put the cause in that way in ruling the admissibility of the general evidence on Hardy's trial. He said that there were two questions of fact, and a legal conclusion, if the facts rendered any legal conclusion necessary : first, whether the conspiracy, as charged, existed at all ; secondly, whether Hardy was party to it ; and thirdly, what was the legal consequence if the two propositions of fact were established. "If," said the court, addressing the prisoner's counsel, "the jury are convinced of the first, *cadit questio*, your client is not responsible, there is no matter of fact for application to the prisoner, and no law for me to deliver." This statement was undoubtedly correct, since the only way that the debated question of treason could arise was, whether the existence of the conspiracy charged by the indictment, if found by the jury, did amount, either by inference

of law, or irresistible conclusion from fact, to a compassing of the King's death? I built this argument upon the foundation of justice to the Attorney-General, which he willingly rendered; for he never contended that a thousand libels on Parliament put together could amount to the crime charged; nor the most seditious intention of approaching Parliament by seditious rioters, tumultuous assemblies; but only that if the prisoners contemplated utterly to subvert the constitutional authorities, including the King's prerogative, thereby destroying the regal office, which no king was likely to survive, that this was a compassing the King's death, without any evidence of a direct conspiracy against his person.

Whether this be law or not is luckily wholly and absolutely irrelevant to the view I mean to take of this question; and, therefore, I protest against giving the House any jurisdiction upon it in this posture of the debate, for very obvious reasons. I have already delivered my opinion on the subject; and though I by no means agree that an advocate is bound in his own person for any statement of the law as counsel at the bar (a dangerous proposition for the country), yet I voluntarily and solemnly now declare that my opinion went along with all that I delivered upon the trial on the subject, and that I believe it is an opinion which no argument nor any length of time

can change. This, however, is a mere digression, as it would be folly to suppose that the House will support my opinion in opposition to that on which it has staked its character with the country; and I am therefore ready, for argument's sake, to suppose the law to be as the House has declared it; and that upon the matter before the House, when viewed *ex parte* only, there is a reasonable ground for believing in the supposed conspiracy; because still the question before the House returns back in its genuine shape, viz., whether after the judicial inquiry, which the House always intended should decide the question, and which could alone decide it, the conspiracy which the House had believed, and, for argument's sake, had reasonably believed, on viewing one side of the evidence, can now be constitutionally believed and acted upon after decisions founded upon the view of both? To decide this question with incontrovertible force, it is clear to demonstration that the jury could not have acquitted Hardy upon any other principle on earth, consistently with common honesty and common sense, than upon the utter disbelief of the existence of the major proposition of fact, *i. e.*, of a conspiracy such as the indictment charged, existing at all. Whoever would read the Attorney-General's opening, which was published by Mr. Gurney,* will see this illustrated with great force.

*See Howell's State Trials, Vol. 24, p 191.

The House can not complain that its cause was not wholly and entirely laid before the jury ; for the Attorney-General, pursuing the views of the House, maintained, and with great ability, first, that a conspiracy such as was charged, to subvert the government, actually existed, and that the whole body of the evidence manifested that specific conspiracy ; secondly, that Hardy was a party to it ; and, lastly, the conclusion of the law, which, as I have observed already, could not arise till both the facts stood established as a foundation for it. The Attorney-General having maintained the major proposition, by laying before the jury the whole mass of the reports, with a variety of other matter, the benevolent invention of spies, felons, and miscreants, next proceeded to maintain that to which I confess I saw then, and see now, no possible answer, viz., that if the conspiracy existed, Hardy was necessarily involved in it ; and I never shall forget, if I were to live for ages, the emotion of my mind upon this part of the argument, which I always considered to be invulnerable. I said at the moment to my worthy and learned associate, Mr. Gibbs, that if, stooping under the pressure of prejudice, or distracted by the extent of the materials, the jury should be led to suppose that a general conspiracy existed, for which, undoubtedly, there was not the smallest foundation, the guilt of Hardy was a mere corollary ; and certainly it was ;

for, take out the correspondence of Hardy from the evidence, and the whole fabric vanishes like an enchantment. He was secretary of the most active and bold society ; he was, in fact, its founder—he composed its original institution—he was the first mover to the convention in Scotland—he was the first mover, also, to the holding of that second convention, the conspiracy to hold which was the charge in the indictment. Whatever was done, he did ; whatever was known, he knew ; whatever was in contemplation, he contemplated. If there was a conspiracy, he unquestionably conspired.

It fell to my lot to open the case of this unfortunate man ; and if I had known what I should have then felt, I would have shrunk back from it ; not from the difficulty of the case, for I thought that nothing, but from the load of prejudice that hung about it. My learned coadjutor and myself having the same opinions, and being resolved to pursue the same course, we had indeed but one, and that was to grapple with the existence of the conspiracy ; for although I did not rashly and madly admit that the establishment of the conspiracies necessarily involved Hardy, yet I never set about the denial of it, because there were some propositions which no prudent advocate would urge. If I had urged it, I must have lost all credit with the honest and judicious men who were to decide upon my client's life and death.

This was so much the case, that the chief justice, in summing up, divided the cause into two branches, as it had been before divided upon the arguments for admitting the evidence, and told the jury that the principal question, and which was a mere unmixed matter of fact, was the conspiracy as charged, and Hardy's share in it. And after having summed up the general evidence, he said he was sorry to say that, if that evidence satisfied them that a convention was intended to be held for the purposes charged, the prisoner stood in an awful predicament; for he not only stood implicated in the larger part of it, but it had been but feebly urged by his counsel that he was not. The judge said true. We forebore to urge it, because we knew that it was not tenable ground. As little reliance had we upon the law as we stated it; for though we were firmly convinced that the defence was invulnerable in point of law, not only by the statute, but even by all the authorities, yet we did not expect that the jury would prefer our statement, as advocates, to the judgment of the court, whether well or ill-founded; but we looked to the great sheet-anchor of the cause, viz., the gross falsehood and absurdity of the supposed conspiracy on which we relied, and on which we prevailed. The jury, after retiring a very short time, pronounced Mr. Hardy not guilty, to the very general satisfaction of the public, as it was

at least generally understood ; and the court adjourned for some days.

On the trial of Mr. Horne Tooke, the chief justice, so far from bringing into doubt or question the propriety of the former verdict, reminded us that, in point of technical form, the verdict should be proved ; and nothing was hinted from bar or bench that there was the smallest cause of dissatisfaction. Mr. Tooke being one of the constitutional society, most of the addresses to Paine, relative to France, were brought home to him ; yet they were found to be perfectly consistent with an attachment to the forms of our own government. And why were they not ? How can it be inconsistent with the subject of a free government to congratulate another nation for asserting its freedom, though in a dissimilar form ? When shall we get rid of bugbears, which are conjured up for our disgrace and our destruction ? The acquittal of Mr. Tooke, I may observe, was a most important place to rest in the matter before the house ; it was a great era in the proceedings, in my own opinion, quite decisive of what the House ought to do this day. In order to state what was done, with precision, we must first look to see who the persons indicted were, and what was the direct evidence against them. The Attorney-General had properly fixed on, as defendants, those who had taken active steps as members, conferring

and co-operating toward holding the convention, for the only persons comprehended in the conspiracy were the members above mentioned and Mr. Hardy, the secretary to the corresponding society. On Mr. Tooke's acquittal, Mr. Joyce, Mr. Holcroft, Mr. Kydd, and Mr. Bonney, the only indicted members of the constitutional society, were discharged by consent, and at that period, that their evidence might be given for the next prisoner. On what principle were these four gentlemen discharged? Upon two principles only; by two, I mean uniting together. First, that Mr. Horne Tooke was honestly and justly acquitted, else his acquittal generated no conclusion in favor of others who stood in a similar predicament. Secondly, that he being innocent, they could not be guilty. And the reason was obvious, for they were engaged in the same object, be it good or evil. The only remaining prisoners under this indictment, were Mr. Thelwell and the other five members of the corresponding society, who were members of the same committee of co-operation. And on the trial of Mr. Thelwell, the chief justice found the acquittal of Mr. Hardy and Mr. Tooke, and the others acquitted by consent, directly in his way. I said the chief justice, for none of the jury, nor any of the audience ever entertained a moment's doubt on any part of the case. And, to be sure, the consequence of the acquittals was irresistible;

for how could one individual be conspiring with others acquitted? And how could their innocence and his guilt stand consistent? How could the two societies be innocent who appointed traitorous committees for traitorous purposes, and who received traitorous reports, if they were traitorous? And how could twelve persons meet for the express purpose of subverting the government, and yet six of them not know what five of the others contemplated? And yet this shameful farce was kept up at an expense ruinous to individuals, until it was fairly beat down by the honest enthusiasm and indignation of the people, which it, in a manner, roused as from a deep sleep.

It only remains to see how all these proceedings affect the case before the House. You have suspended the *habeas corpus* act on the assumed existence, on *ex parte* evidence, of a specific conspiracy detailed with the greatest accuracy; and you have suspended it for the purpose of judicial trials. You have not convicted one man in England, and you have made the country a scene of triumph at your defeat. Do you mean to go on with the new prosecutions to establish this conspiracy to hold a convention? If you say yes, you must state the progress; who are the criminals? what are their numbers? and why are they not now ready for trial? But, supposing you mean to go on, and are still unprepared for trial, the *habeas*

corpus act has no operations on treason which can affect the case. You may postpone the trial, under the wise exception provided in the *habeas corpus* act that the prisoner shall not be bailed or discharged, though not brought to trial in the ordinary course, provided it appears upon oath that the witnesses for the Crown are absent. Supposing, therefore, that individuals are still suspected of, or charged with treason, or even with this specific treason, now that the matter has been so fully and fairly investigated, why can they not be proceeded upon according to law, without a total suspension of the liberties of the whole nation? Why can not individuals be brought in this as in any other case, to justice, without arming the Crown with a dangerous authority, which its ministers, in some of its stages of subordination would in the nature of things abuse and which can not be vindicated upon any principle of general utility or safety? I can not help thinking that this argument presses more than was conceded, when, notwithstanding the acquiescence of the Crown, the verdicts, without being constitutionally questioned, were sought to be discredited. And because that could not be done with effect, the very trial by jury itself was to be brought into disrepute.

The right honorable gentleman who spoke last, instead of speaking to the question, delib-

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erately defended himself against the attacks of Mr. Sheridan, and seemed to think every body bound to subscribe to his acquittal upon his bare word; for he had called no witnesses, not even to his character, which was his principal defence. He did not wish to question the right honorable gentleman's defence, even under these circumstances. How much more, then, should he respect the cases of men who had called witnesses, and who had been acquitted by their country! I am sorry to see these peevish observations in this place; not because they affect the trial by jury, the value of which is too deeply rooted in the heart of every Englishman to be impaired by any observations, but because it brings the House of Commons into disrepute, which is already but too much sunk in the estimation of the people. This consideration leads to the only remaining topic, the policy of rejecting the motion. Is this a time for us to affront and tease the people with groundless jealousies? We, their servants and their representatives, if we, instead of sitting here, the popular branch of government, to protect them, charge them with vague, unfounded conspiracies, let us take care that the charge be not reverberated on us. Above all let us attend with prudence to the present calamitous conjuncture. If, in consequence, our enemies, whom we affect to despise—with whom we will not, whom, it seems, we can not treat with

—if they should, as perhaps they may, be in a short season upon our coasts to invade us—if the present system continues, who is to defend the country? Who but this insulted people whom we calumniate? The people only can do it, and they only will do it, as they feel an interest worth the exertion. Let the chancellor of the exchequer attend to the maxim happily expressed by the poet, and no less happily applied by his great father to the case of alienated America:

“Be to their virtues very kind,
Be to their faults a little blind;
Let all their ways be unconfin’d,
And clap the padlock on their mind.”

THE END.

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